Supreme Court, U.S.
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No. OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

JAMES MOTTOLA,

Petitioner,

v.

TAWA AYENI AND KAYODE AYENI,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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January 1995

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QUESTION PRESENTED

Whether under *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), and *Anderson v. Creighton*, 483 U.S. 635 (1987), a court may find an asserted constitutional right "clearly established" for purposes of overcoming a qualified immunity defense if, at the time of the allegedly unconstitutional conduct, the only state and federal courts to have addressed the question had squarely held that the particular right in question did not exist at all?

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

James Mottola respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra,* 1a-23a) is reported at 35 F.3d 680. The opinion of the district court (App., *infra,* 54a-66a) is reported at 848 F. Supp. 362.

JURISDICTION

The judgment of the court of appeals was entered on September 12, 1994. On December 7, 1994, Justice Ginsburg

extended the time for filing a petition for a writ of certiorari to and including January 10, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Title 18, Section 3105 of the United States Code provides:

> A search warrant may in all cases be served by any of the officers mentioned in its direction or by an officer authorized by law to serve such warrant, but by no other person, except in aid of the officer on his requiring it, he being present and acting in its execution.

STATEMENT

1. Because this case comes to this Court following denial of petitioner's motion to dismiss on qualified immunity grounds, facts alleged in the complaint must be taken as true. *Hartford Fire Ins. Co. v. California*, 113 S.Ct. 2891, 2895 (1993). In their complaint, plaintiffs-respondents allege:

On March 5, 1992, James Mottola, a Special Agent of the United States Secret Service, obtained a federal warrant to search the apartment of Babatunde Ayeni. Probable cause for issuance of the warrant arose from information provided by a confidential informant that Ayeni was engaged in credit card fraud. The warrant was issued to Agent Mottola, authorizing him and other agents of the United States Secret Service to enter Ayeni's apartment and search for certain specified items. App., *infra,* 2a.

At 6:00 p.m., six federal agents (not including Agent Mottola) arrived at Ayeni's apartment, knocked on the door, and announced that they were police conducting an investigation. Babatunde Ayeni's wife, Tawa Ayeni, opened the door, and one of the agents pushed her aside as two others opened the door. The agents then entered the apartment. Babatunde Ayeni was not present; his son Kayode was. App., *infra,* 2a-3a.

Some of the agents began searching the apartment, and Ms. Ayeni asked to be shown a warrant. An agent told her someone was bringing it. It is unclear whether the agents ceased their search at that point. At 7:50 p.m., an unidentified party notified the agents by radio that the warrant had been signed, whereupon they began a comprehensive search. App., *infra,* 3a.

At approximately 8:15 p.m., Mottola and three other

Special Agents from the United States Secret Service arrived with the warrant. Three members of a CBS television crew from a weekly news program — "Street Stories" — also entered the apartment, operating a video camera and sound recording device as they observed the search. Ms. Ayeni objected to the taping of herself and her son, and when she tried to stop it by covering her son's face with a magazine, Agent Mottola took the magazine from Ms. Ayeni and asked both Ayenis to "shut up." App., *infra*, 3a-4a.

Twenty minutes after it had arrived, the news crew left, along with several of the agents. About an hour later, the remaining agents departed. CBS never aired the news segment it had recorded. App., *infra,* 4a.

2. Respondents Tawa Ayeni and Kayode Ayeni brought a *Bivens*[1] action against CBS, various unnamed federal law enforcement officers, and petitioner, alleging, *inter alia,* that Agent Mottola had violated their Fourth Amendment rights by permitting a media organization to accompany the officers who served and executed the warrant and conducted a search at the Ayenis' home. Agent Mottola moved to dismiss, contending that he was entitled to immunity from suit because plaintiffs had not alleged violation of a clearly established Fourth Amendment right. The United States District Court, Jack B. Weinstein, J., denied Agent Mottola's motion after finding to the contrary. App., *infra,* 52a-53a. Agent Mottola brought an interlocutory appeal. *See Mitchell v. Forsyth,* 472 U.S. 511, 526-27 (1985).

3. The United States Court of Appeals for the Second Circuit, Jon O. Newman, J., affirmed. Acknowledging the

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[1]*See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics,* 403 U.S. 388 (1971).

complete lack of on-point authority supporting its ruling, and apparently ignoring the unanimous reported authority cited by Agent Mottola holding that the presence of the news media at the execution of a warrant does not violate the Fourth Amendment, *see Moncrief v. Hanton,* 10 Media L. Rptr. 1620, 1622 (N.D. Ohio 1984); *Higbee v. Times Advocate, Inc.,* 5 Media L. Rptr. 2372 (S.D. Cal. 1980); *Prahl v. Brosamle,* 295 N.W.2d 768, 773 (Wis. Ct. App. 1980), the Second Circuit relied solely upon general principles of Fourth Amendment law to conclude, *inter alia,* that the Ayenis' complaint alleged violation of a clearly established Fourth Amendment right to be free from media coverage of the lawful execution of a valid search warrant in one's home. App., *infra,* 1a.

REASONS FOR GRANTING THE PETITION

In *Harlow v. Fitzgerald,* 457 U.S. 800 (1982), this Court held that "government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate *clearly established* statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818 (emphasis added). This qualified immunity doctrine strikes a careful balance between society's competing "interests in vindication of citizens' constitutional rights and in public officials' effective performance of their duties" by making it possible for officials "reasonably [to] anticipate when their conduct may give rise to liability for damages." *Davis v. Scherer,* 468 U.S. 183, 195 (1984).

The requirement that a right be "clearly established" in order for liability to attach is the linchpin of the qualified immunity doctrine. "If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly

be said to 'know' that the law forbade conduct not previously identified as unlawful." *Harlow*, 457 U.S. at 818. This is particularly true where the Fourth Amendment is involved. Law enforcement officials know that the Amendment protects the citizenry from "unreasonable" searches and seizures by governmental officials. But this abstract principle provides little guidance to the officer in the field, and permitting such a general principle — without more — to clearly establish the unlawfulness of particular conduct in concrete cases like Agent Mottola's would "convert the rule of qualified immunity that [this Court's] cases plainly establish into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights." *See Anderson v. Creighton,* 483 U.S. 635, 639 (1987).

This Court forbade such loose extrapolation in *Anderson v. Creighton,* holding that "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful; but it is to say that in light of pre-existing law the unlawfulness *must be apparent.*" *Id.* at 640 (citation omitted; emphasis added). In holding as it did, the Court "recognized that it is inevitable that law enforcement officials will in some cases reasonably but mistakenly conclude that" constitutional prerequisites are satisfied, "and . . . in such cases those officials . . . should not be held personally liable." *Id.* at 641.

The court of appeals failed to heed this command, and this Court should grant review for two reasons. First, the Court should take this opportunity to clarify the specificity requirement of *Anderson* by articulating a bright-line test for lower courts, stating that they are not free to find "clearly established" rights based on general principles of constitutional

law when decisions directly addressing the allegedly unlawful conduct flatly *reject* the putative right. Second, the Court should clarify in this case the proper sources of authority upon which courts may and should draw to determine whether a given constitutional right is clearly established. The second is an issue on which the circuits are divided. Review of both these issues would well serve the overall purpose of the doctrine itself, to free public officers from unwarranted "fear of harassing litigation," *Davis,* 468 U.S. at 195, and to provide "ample protection to all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs,* 475 U.S. 335, 341 (1986).

1. The Second Circuit's analysis of Agent Mottola's qualified immunity claim undermines this Court's existing jurisprudence on qualified immunity by ignoring the command of *Anderson v. Creighton,* 483 U.S. 635, 639 (1987). *See Oliveira v. Mayer,* 23 F.3d 642, 649 n.2 (2d Cir. 1994) (Newman, J.) (criticizing *Anderson*). As noted above, *Anderson* bars lower courts from finding a "clearly established" right based on general principles of constitutional law when decisions directly on point flatly reject any such right. But that is precisely what the Second Circuit did here.

Despite a complete lack of supportive cases on point, the court of appeals still found that Agent Mottola violated the Ayenis' *clearly established* Fourth Amendment rights by permitting a television crew to attend execution of the warrant. It found this highly specific right in Fourth Amendment cases of extraordinary generality. *See* App., *infra,* at 5a-11a. In so doing, it completely ignored three reported decisions directly on point finding that no such right exists. *Moncrief v. Hanton,* 10 Media L. Rptr. 1620, 1622 (N.D. Ohio 1984); *Higbee v. Times Advocate, Inc.,* 5 Media L. Rptr. 2372 (S.D. Cal. 1980); *Prahl v. Brosamle,* 295 N.W.2d 768, 773 (Wis. Ct. App. 1980). The unlawfulness

of a particular action cannot be "apparent" when a law enforcement officer must choose between, on the one hand, constitutional generalities in the law of his own jurisdiction that *might* one day be interpreted to forbid certain conduct, and, on the other, concrete authority — albeit in other jurisdictions — that unequivocally *allows* the very conduct at issue. If a goal of the qualified immunity doctrine is to permit reasonable officers of the law to order their conduct to avoid liability, that goal is poorly served by such a decision.

This is particularly true where Fourth Amendment rights are implicated. This Court has "frequently observed, and [its] many cases on the point amply demonstrate, the difficulty of determining whether particular searches or seizures comport with the Fourth Amendment." *Anderson,* 483 U.S. at 644. As noted above, at the time Agent Mottola permitted the CBS news crew to monitor the government's execution of the search warrant at Babatunde Ayeni's residence, three federal and state courts had rejected claims that such conduct violated the occupants' Fourth Amendment rights. *Moncrief,* 10 Media L. Rptr. at 1622; *Higbee*, 5 Media L. Rptr. at 2372; *Prahl,* 295 N.W.2d at 773.

Moreover, conventional news programs and less traditional reality-based "cop shows" filmed all types of police action, including the execution of search and arrest warrants in private residences. In fact, "[s]o-called reality-based or 'docu-cop' programming has been extensively successful with television audiences and producers over the *past decade.* Shows like 'Night Beat,' 'Cops,' 'Top Cops,' 'American Detective,' and 'America's Most Wanted,' are . . . wildly successful with viewers . . ." Robin Andersen, *"Reality" TV and Criminal Justice: Programs That Film Police Conduct,* THE HUMANIST, Sept. 1994, at 8 (emphasis added). For years prior to Agent Mottola's conduct in this case, these "reality shows" had "flooded television screens . . ." James

Nold, Jr., *Crime In Prime Time: Real-Life Cops and Robbers Rate Their TV Counterparts,* THE COURIER-JOURNAL, Dec. 21, 1991, at 4S (Metro Edition). Indeed, one news article reporting the district court's decision in this very case noted that the "last few years have brought a flurry of so-called 'reality' series such as 'Street Stories,' CBS' '48 Hours' and Fox's 'Cops' that have followed various government agents on drug 'busts' and other activities." Jane Hall, *Judge Says "Reality" TV Can't Join Raids,* LOS ANGELES TIMES, Nov. 23, 1992, at F1 (Home Edition). This highly visible media presence at police activities of all types strongly reinforces the impression given by the law then on the books: it could not have been apparent to a reasonable law enforcement official in March of 1992 that permitting the media to accompany the execution of a search warrant was unlawful.

Both the district court and the court of appeals simply refused to acknowledge the existence of *Moncrief*, *Higbee*, and *Prahl*, which were the centerpiece of Agent Mottola's defense under *Harlow* and *Anderson*. Both courts also ignored the fact that Agent Mottola's conduct was commonplace. *See* App., *infra*, 32a ("They shouldn't do these things, the government. They do them all the time . . .") (comment by the district court). And while both courts conceded that "no reported decision . . . expressly forbids searching agents from bringing members of the press into a home to observe and report on their activities," App. 9a; App. 61a, both also concluded that a Fourth Amendment prohibition on press attendance at warrant execution was clearly established. To justify this seemingly untenable conclusion, the Second Circuit noted that judicial decisions prior to Agent Mottola's actions had

> made clear that law enforcement officers conducting searches under a warrant are limited in their conduct to either (a) actions authorized by the warrant, or (b) such

> further actions as are impliedly authorized because they are reasonably related to accomplishing the search authorized by the warrant or accomplishing legitimate law enforcement objectives, such as insuring the safety of the searching officers and effectively responding as law enforcement officers to circumstances that might arise during the course of the search.

App., *infra,* 8a-9a (footnote omitted).

Even if one assumes, as the Second Circuit did here, that a warrant identifies those who may execute it rather than those who may serve it, the four cases cited in support of proposition (a) do not bear the weight the court of appeals put upon them. Each simply observes that the Fourth Amendment confines searches and seizures by law enforcement officials to the *items* listed in the warrant. *See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics,* 403 U.S. 388, 394 n.7 (1971); *United States v. Matias*, 836 F.2d 744, 747 (2d Cir. 1988); *United States v. Crozier,* 777 F.2d 1376, 1381 (9th Cir. 1985); *United States v. Heldt,* 668 F.2d 1238, 1260 (D.C. Cir. 1981), *cert. denied,* 456 U.S. 926 (1982) (also addressing agent preparation and area limitations). None discusses limitations on the persons who may accompany those executing warrants. None invalidates a search or seizure.

With respect to proposition (b), the two cases cited in its support, *Michigan v. Summers,* 452 U.S. 692 (1981), and *United States v. Barlin,* 686 F.2d 81 (2d Cir. 1982), upheld, respectively, warrantless detention during searches and warrantless premises searches for purposes of self-protection. Neither case discusses limitations on the persons who may accompany those executing warrants. Neither invalidates a search or seizure.

In finding that Agent Mottola violated the Ayenís' clearly established Fourth Amendment rights, the Second Circuit also relied on cases interpreting a federal warrant statute, 18 U.S.C. § 3105, to "provide some basis for giving content to the Amendment's generalized standard of reasonableness." App., *infra,* at 12a (citing *United States v. Wright,* 667 F.2d 793, 797 (9th Cir. 1982); *United States v. Clouston,* 623 F.2d 485 (6th Cir. 1980); *United States v. Gervato,* 474 F.2d 40, 45 (3d Cir.), *cert. denied,* 414 U.S. 864 (1973); *United States v. Gambino,* 734 F. Supp. 1084, 1091 (S.D.N.Y. 1990); In re *Southeastern Equip. Co. Search Warrant,* 746 F. Supp. 1563, 1577 (S.D. Ga. 1990); *United States v. Schwimmer,* 692 F. Supp. 119, 126-27 (E.D.N.Y. 1988)). The use of cases interpreting a *statute* to determine whether a *constitutional* right was clearly established is novel. Moreover, this particular statute, identifying the persons who may serve a warrant, does not on its face even address the question of who may execute it or who may accompany those executing it. *See* App., *infra,* at 12a.

The six cited cases simply fail to establish at all that a reasonable law enforcement agent violates the Fourth Amendment by permitting the media to observe the execution of a warrant. All six searches were upheld. Four of them *(Clouston, Gambino, Southeastern Equipment,* and *Schwimmer),* expressly *rejected* challenges to the use of a nongovernmental third party in the execution of the warrant.

None of these Fourth Amendment and statutory cases relied upon by the Second Circuit speaks to the question faced by Agent Mottola. *Moncrief, Higbee,* and *Brosamle* do. It is difficult to see how the cases it cited led the Second Circuit to conclude that there was a "clearly established" right to be free from press access at the execution of a warrant; it is certain that no reasonable law enforcement officer would have reached that conclusion, and by holding otherwise the Second

Circuit rendered meaningless *Anderson's* requirement that "[t]he contours of the right . . . be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson*, 483 U.S. at 640.

This case presents an excellent opportunity for the Court to establish a bright-line rule in this difficult area — a roadmap for lower courts and law enforcement agencies alike. This, at least, should be certain: where judicial authorities across various jurisdictions are mixed on the existence of a particularized right, courts cannot ignore that jurisprudence and find that the right in question has been clearly established based on more general jurisprudence in the home jurisdiction. *See McConnell v. Adams*, 829 F.2d 1319, 1325 (4th Cir. 1987) ("[W]here there is a legitimate question whether [legal principles established in analogous factual contexts] extend to the particular case before the court or whether the particular case might constitute an exception to those principles, the court should sustain a qualified immunity defense."), *cert. denied*, 486 U.S. 1006 (1988); *Richardson v. Oldham*, 12 F.3d 1373, 1381 (5th Cir. 1994) (requiring that illegality of challenged conduct be clearly established in "closely analogous" factual circumstances); *Adams v. St. Lucie County Sheriff's Dep't*, 962 F.2d 1563, 1575 (11th Cir. 1992) (Edmondson, J., dissenting) (requiring that illegality be clearly established by cases with "materially similar" facts), *approved en banc*, 998 F.2d 923 (11th Cir. 1993). Unless controlling authority of equivalent specificity exists in the home jurisdiction, the court must grant the defendant immunity from suit. At the very least, this must be the case where, as here, judicial authorities across jurisdictions are unanimous in their conclusions that the particularized right does *not* exist.

Reasonable officials can be expected to know particularized legal rules articulated in reported opinions. They cannot be expected to play the role of a judicial

Hercules, performing elaborate analysis to extract legal rules from the seamless, but sometimes tangled, web of generalized constitutional law.

2. This case also calls for review because the circuits have divided on the proper sources of legal authority to be used in ascertaining whether a particular right has been clearly established for purposes of overcoming a qualified immunity defense. ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 8.6, at 479-80 (2d ed. 1994); SHELDON H. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983 § 8.07, at 134-35 (3d ed. 1994). This Court expressly reserved the issue of proper sources in both *Harlow v. Fitzgerald*, 457 U.S. 800, 818 n.32 (1982), and *Procunier v. Navarette*, 434 U.S. 555, 565 (1978). Since that time courts have taken highly inconsistent, largely *ad hoc* approaches to questions concerning whether particular rights are clearly established.[2] This Court's guidance is needed to insure that courts taking a restrictive view of the relevant sources (like the Second Circuit) do not apply those restrictive rules to defeat legitimate claims of qualified immunity by conscientious law enforcement officers.

In an attempt to prevent unwarranted imposition of liability on law enforcement officials making difficult judgments in the field, the Second Circuit purports to look only to its own law and Supreme Court precedent to determine whether a right defined with "reasonable specificity" has been clearly established so that a "reasonable defendant official

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[2]Even where courts purport to apply the same methodology within the same circuit, results have sometimes been wildly inconsistent. *Compare, e.g.*, the Second Circuit's decision here, App., *infra*, at 1a, to the Second Circuit's decision in *P.C. v. McLaughlin*, 913 F.2d 1033 (2d Cir. 1990) (taking a highly particularized view and finding a variety of rights not clearly established at time of the alleged violations).

would have understood that his or her acts were unlawful." *Soares v. State of Connecticut*, 8 F.3d 917, 922 (2d Cir. 1993). Many other circuits take — or appear to take — a similar view. *See, e.g., Ohio Civil Serv. Employees Ass'n v. Seiter*, 858 F.2d 1171, 1177-78 (6th Cir. 1988) ("[T]o find a clearly established constitutional right, a district court must find binding precedent by the Supreme Court, its court of appeals or itself."[3]); *Woodward v. City of Worland*, 977 F.2d 1392 (10th Cir. 1992), *cert. denied*, 113 S. Ct. 3038 (1993) (awarding immunity because law not established "in our Circuit" despite earlier establishment in Seventh Circuit), *cert. denied*, 113 S. Ct. 3038 (1993); *Belcher v. City of Foley*, 30 F.3d 1390 (11th Cir. 1994) (holding that other circuits may not be able to clearly establish law in the Eleventh Circuit).

Other courts, by contrast, use a more flexible approach, considering cases from all jurisdictions. *See, e.g., Borucki v. Ryan*, 827 F.2d 836, 847-849 (1st Cir. 1987) (considering cases from other jurisdictions and concluding that circuit split foreclosed possibility of clearly established right); *Giuffre v. Bissell*, 31 F.3d 1241, 1256-59 (3d Cir. 1994) (considering cases from other jurisdictions); *Swanson v. Powers*, 937 F.2d 965, 969 (4th Cir. 1991) (same), *cert. denied*, 112 S. Ct. 871 (1992); *Dee v. State of Louisiana*, 2 F.3d 1412, 1416 n.8 (5th

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[3]The Sixth Circuit did recognize that "[i]n an extraordinary case, it may be possible for the decisions of other courts to clearly establish a principle of law. For the decisions of other courts to provide such 'clearly established law,' these decisions must both point unmistakably to the unconstitutionality of the conduct complained of and be so clearly foreshadowed by applicable direct authority as to leave no doubt in the mind of a reasonable officer that his conduct, if challenged on constitutional grounds, would be found wanting . . . . [A] mere handful of decisions of other circuit and district courts, which are admittedly novel, cannot form the basis for a clearly established constitutional right." *Seiter*, 858 F.2d at 1177-78.

Cir. 1983) (*citing Melear v. Spears*, 862 F.2d 1177, 1184 n.8 (5th Cir. 1989) ("[W]e will not rigidly define the applicable body of law in determining whether relevant legal rules were clearly established at the time of the conduct at issue.")); *Donovan v. City of Milwaukee*, 17 F.3d 944, 952 (7th Cir. 1994) ("In ascertaining whether a particular right has been 'clearly established' within the meaning of *Harlow*, this court has not required binding precedent from the Supreme Court or the Seventh Circuit."); *Boswell v. County of Sherburne*, 849 F.2d 1117, 1121-22 (8th Cir. 1988) (considering cases from another jurisdiction); *Kirkpatrick v. City of Los Angeles*, 803 F.2d 485 (9th Cir. 1986); *Hunter v. District of Columbia*, 943 F.2d 69, 78 (D.C. Cir. 1991) (finding right not clearly established in light of contrary views expressed by other circuits).

The Second Circuit offered no defense of its refusal to consider the cases from other jurisdictions cited by Agent Mottola which held that there is no Fourth Amendment right to freedom from media access during execution of a search warrant. It simply ignored them. This might be "consistent" with the test the Second Circuit articulated in *Soares*, which requires the court to focus on "whether the decisional law of the Supreme Court and the [Second Circuit] support[s] the existence of the right in question," 8 F.3d at 922, but it is not consistent with the holdings of this Court. *See Mitchell v. Forsyth*, 472 U.S. 511, 535 (1985) (finding no clearly established right at time of unconstitutional conduct because, *inter alia*, two district courts *outside defendant's jurisdiction* had upheld the challenged conduct in *unpublished* opinions).

This Court's guidance is needed to make clear that where directly on-point precedent from other jurisdictions affirms the legality of an official's conduct, a court cannot find that the official violated a plaintiff's "clearly established" rights based on substantially more general precedent within the jurisdiction.

When the precedent against the existence of a particularized right is unanimous, it is even more important that courts not be free to find that right "clearly established" based on constitutional generalities. Judges are trained innovators in the law, required to adapt general principles to concrete situations. Reasonable (but not perfect) law enforcement officers making decisions in the field are not, and given evidence of mixed views on a particular question they must not be held liable for their failure to predict the future evolution of specific legal rules from broad legal principles like those relied on by the Second Circuit to justify exposing Agent Mottola to personal liability here.

CONCLUSION

Therefore, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDICES

APPENDIX A

Tawa AYENI, *et al.*, Plaintiffs-Appellees,

v.

James MOTTOLA, Defendant-Appellant.

No. 1789, Dockets 94-6041(L), 94-6047.

United States Court of Appeals,
Second Circuit.

Argued April 8, 1994.

Decided Sept. 12, 1994.

Edward R. Cohen, Washington, DC (Frank W. Hunger, Asst. Atty. Gen. Barbara L. Herwig, Asst. Director, Department of Justice, on the brief), for defendant-appellant.

Henry H. Rossbacher, Los Angeles, CA (Tracy W. Young, Nanci E. Nishimura, Karen E. Widess, Rossbacher & Associates, Los Angeles, CA, Harry C. Batchelder, Jr., New York City, on the brief), for plaintiffs-appellees.

Before: NEWMAN, Chief Judge, PIERCE and LEVAL, Circuit Judges.

JON O. NEWMAN, Chief Judge:

The quest of television reporters for on-the-scene coverage of dramatic events and the interest of law

enforcement agencies in promoting their own image have combined to present for decision an appeal with important consequences for the right of privacy of those inside a home. The appeal arises because a Secret Service agent has been sued for inviting the crew of a TV news magazine into a private home to videotape a search. The principal issues are whether the agent's conduct in bringing a television crew into a home violates the Fourth Amendment rights of a mother and child within the home, and if so, whether the agent is nonetheless shielded by qualified immunity from personal liability for damages. These issues arise on an interlocutory appeal by Special Agent James Mottola from the February 10, 1994, order of the District Court for the Eastern District of New York (Jack B. Weinstein, Judge) denying Mottola's motion to dismiss on qualified immunity grounds a suit brought by Tawa Ayeni and her son, Kayode Ayeni. See *Ayeni v. CBS, Inc.*, 848 F. Supp. 362 (E.D.N.Y. 1994). We conclude that the complaint alleges clear violations of the constitutional ban on unreasonable searches and seizures and that the agent's claim of qualified immunity was properly rejected. We therefore affirm.

Facts

Plaintiffs' complaint, which we accept as true on this interlocutory appeal, alleges the following circumstances. On March 5, 1992, defendant Mottola received a warrant to search the Ayenis' apartment based upon information obtained from a confidential informant that Babatunde Ayeni was engaging in credit card fraud. Plaintiff Tawa Ayeni is Babatunde Ayeni's wife, and plaintiff Kayode Ayeni is their son. Neither plaintiff was suspected of any participation in the alleged fraudulent scheme. The warrant authorized Mottola and "any Authorized Officer of the Untied States" to enter the apartment and search for specified evidence of credit care fraud. At 6:00 p.m., Mrs. Ayeni and Kayode were

home alone when six agents (four or five Secret Service agents and one or two Postal Service inspectors) arrived without a warrant, pounded on the door, and announced that they were police conducting an investigation. Agent Mottola was not present in this first wave of agents, though he may have been in communication with them by radio. When Mrs. Ayeni, clad in a dressing gown, opened the door slightly, one agent pushed her in the chest to move her away from the door while two others pushed open the door, and the agents entered the apartment.

As several of the agents rushed into the bedroom and began searching inside the closets, Mrs. Ayeni asked to be shown a search warrant. One of the agents informed her that they were waiting for other people to bring the warrant; it is unclear whether the agents then stopped searching the premises. At 7:50 p.m., the agents were notified by radio, possibly by defendant Mottola, that the warrant had just been signed, and the agents commenced an aggressive search. Approximately 25 minutes later, Mottola arrived with the warrant. He was accompanied by three other Secret Service agents, and, particularly pertinent to this appeal, three members of a CBS television crew from the "Street Stories" weekly news magazine program.[1] The CBS crew operated a video camera and sound recording devices as they followed the agents during the search of the Ayeni home.

Mrs. Ayeni objected to the videotaping of herself and her son. She tried to avoid the camera by covering her face with a magazine. Kayode was crying and told his mother that he was frightened. When Mrs. Ayeni attempted to shield her son's face with a magazine, Mottola grabbed the magazine out

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[1] The TV crew was led by a producer of the "Street Stories" program. It is not clear whether the members of the crew were CBS employees.

of her hand, threw it on the floor, and told the plaintiffs to "shut up." Mottola or one of the other agents directed the camera crew to videotape Mrs. Ayeni's face. Mrs. Ayeni was taped while an agent questioned her to learn where her husband was and how she had paid for several expensive watches that the agent found. The camera crew also videotaped the agents searching the home and the personal effects of the Ayenis, including books, photographs, financial statements, and personal letters. During the search, the agents broke the leg of the plaintiffs' couch and a television stand.

The CBS crew videotaped the search for approximately 20 minutes, and then left the premises with several agents. The remaining agents completed the search and left at approximately 9:35 p.m., more than three hours after the initial entry. The only tangible item seized from the home was a photograph of the Ayeni family. CBS never broadcast any portion of the video footage.

Plaintiffs instituted a *Bivens* action against Agent Mottola, other agents, and CBS.[2] *See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971). Judge Weinstein denied Agent Mottola's motion to dismiss on the grounds of qualified immunity, 848 F. Supp. 362, and Mottola brought this interlocutory appeal.

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[2] CBS, originally named as a defendant in this action, has arrived at a confidential settlement with the plaintiffs. *See* Brief for Appellees at 2 n.1. At the time of the proceedings in the District Court, the unknown agents and inspectors also sued in this action had not yet been served with a complaint; hence Mottola is the sole defendant for the purposes of this appeal. *See Glaros v. Perse*, 628 F.2d 679, 685 (1st Cir. 1980). The Government has since disclosed the names of the unknown agents.

Discussion

Mottola is entitled to judgment as a matter of law if he can demonstrate either that the rights claimed by the plaintiffs to have been violated were not "clearly established" as of the time of the search, or that it was "objectively reasonable" for him to believe that his acts did not violate those clearly established rights. *See Soares v. Connecticut*, 8 F.3d 917, 920 (2d Cir. 1993); *Finnegan v. Fountain*, 915 F.2d 817, 823 (2d Cir. 1990).

I. Fourth Amendment Claims

Bearing in mind the standards for dismissing a claim on qualified immunity grounds, we first examine whether clearly established Fourth Amendment law at the time of the search prohibited Mottola's actions in bringing the CBS TV crew into the Ayeni home, and, if so, whether it was objectively reasonable for Mottola to believe that his actions did not violate that clearly established law. Plaintiffs contend that Mottola's conduct exceeded Fourth Amendment limitations in three respects: (a) the Ayenis' privacy was invaded by the presence of unauthorized persons in their home, (b) the conduct of the search was excessively intrusive, and (c) some of the searching occurred before a warrant was issued.

A. Entry by Unauthorized Persons

The contention that protected privacy within the Ayenis' home was violated by the presence of unauthorized persons is based on Fourth Amendment standards, somewhat reenforced by statutory requirements.

1. *Fourth Amendment standards.* The Fourth Amendment to the Constitution states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The text of the Amendment makes clear that all searches must be "reasonable," and this is so even under the limited circumstances in which a warrant may be issued. The reasonableness requirement of the Fourth Amendment applies not only to prevent searches and seizures that would be unreasonable if conducted at all, but also to ensure reasonableness in the manner and scope of searches and seizures that are carried out, whether pursuant to a warrant or under "exigent circumstances." *See Graham v. Connor*, 490 U.S. 386, 395, 109 S. Ct. 1865, 1871, 104 L. Ed. 2d 443 (1989); *Tennessee v. Garner*, 471 U.S. 1, 7-8, 105 S. Ct. 1694, 1699-1700, 85 L. Ed. 2d 1 (1985).

The protection of privacy from encroachment by government officers is the "'principal' object of the [Fourth] Amendment."[3] The home has properly been regarded as among the most highly protected zones of privacy,[4] and the

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[3] *Soldal v. Cook County*, ___ U.S. ___, ___, 113 S.Ct. 538, 545, 121 L.Ed.2d 450 (1992) (citing *Warden, Maryland Penitentiary v. Hayden*, 387 U.S. 294, 304, 87 S.Ct. 1642, 1648-49, 18 L.Ed.2d 782 (1967), and *Jones v. United States*, 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960)); *see also Winston v. Lee*, 470 U.S. 753, 758, 105 S.Ct. 1611, 1615, 84 L.Ed.2d 662 (1985).

[4] *See Winston*, 470 U.S. at 761-62, 105 S.Ct. at 1617-18; *Payton v. New York*, 445 U.S. 573, 585, 589-90, 100 S.Ct. 1371, 1381-82, 63 (continued...)

"sanctity of private dwellings [is] ordinarily afforded the most stringent Fourth Amendment protection."[5] While incursions into private homes are permitted under certain limited circumstances in order to protect the public's interest in controlling crime, determinations regarding the necessity, location, scope, and conditions of such incursions are generally to be made by the disinterested judicial officers, and not by the officers conducting the searches:

> The right of officers to thrust themselves into a home is . . . a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent.

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[4](...continued)
L.Ed.2d 639 (1980) ("physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed"); *United States v. Berkowitz*, 927 F.2d 1376, 1387 (7th Cir. 1991); *United States v. Winsor*, 846 F.2d 1569, 1579 (9th Cir. 1988) (en banc).

[5] *United States v. Martinez-Fuerte*, 428 U.S. 543, 561, 96 S.Ct. 3074, 3084-85, 49 L.Ed.2d 1116 (1976), *United States v. Reed*, 572 F.2d 412, 422 (2d Cir.), *cert. denied*, 439 U.S. 913, 99 S.Ct. 283, 58 L.Ed.2d 259 (1978); *see also South Dakota v. Opperman*, 428 U.S. 364, 367, 96 S.Ct. 3092, 3096, 49 L.Ed.2d 1000 (1976) (less rigorous warrant requirements govern automobile searches because the expectation of privacy with respect to automobile is significantly less than that relating to one's home or office); *United States v. Bonfiglio*, 713 F.2d 932, 935 (2d Cir. 1983) ("[T]he warrant requirement of the Fourth Amendment protects the individual's right to privacy and society's interest in reasonable security and freedom from surveillance in that it severely limits an officer's right to thrust himself into an individual's home.").

Payton v. New York, 445 U.S. 573, 586, n.24, 100 S. Ct. 1371, 1380 n.24, 63 L. Ed. 2d 639 (1980) (quoting *Johnson v. United States*, 333 U.S. 10, 14, 68 S. Ct. 367, 369, 92 L.Ed. 436 (1948)).

Moreover, since the establishment of the exclusionary rule dating back to 1914 for federal officers, *see Weeks v. United States*, 232 U.S. 383, 34 S. Ct. 341, 58 L.Ed. 652, and to 1961 for state officers, *see Mapp v. Ohio*, 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081, law enforcement personnel have been aware that, if their searches were not conducted in accordance with the requirements of the Fourth Amendment, they would be futile since any evidence discovered would be suppressed. During these many years, court decisions have repeatedly made clear that law enforcement officers conducting searches under a warrant are limited in their conduct to either (a) actions expressly authorized by the warrant,[6] or (b) such further actions as are impliedly authorized because they are reasonably related to accomplishing the search authorized by the warrant or accomplishing additional legitimate law enforcement objectives, such as insuring the safety of the searching officers and effectively responding as law enforcement officers to

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[6] *See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 394 n.7, 91 S.Ct. 1999, 2004 n.7, 29 L.Ed.2d 619 (1971) ("[T]he Fourth Amendment confines an officer executing a search warrant strictly within the bounds set by the warrant. . . ."); *see also United States v. Matias*, 836 F.2d 744, 747 (2d Cir. 1988); *United States v. Crozier*, 777 F.2d 1376, 1381 (9th Cir. 1985); *United States v. Heldt*, 688 F.2d 1238, 1260 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 926, 102 S.Ct. 1971, 72 L.Ed.2d 440 (1982).

circumstances that might arise during the course of the search.[7]

With respect to express authorization, a warrant identifies not only the premises that may be searched and the items that may be examined or seized, but also *the officers who are authorized to participate in the search and seizure*. The warrant authorizing the search of the Ayeni home was directed to "James Mottola and any Authorized Officer of the United States." Mottola's affidavit, submitted with his warrant application, requested that "search warrants be issued to any Special Agent of the United States Secret Service to enter, with proper assistance," the Ayeni home to search for and seize various documents related to suspected credit card fraud. Neither document requests or permits the presence of a television camera crew, nor do either indicate that video and sound recording of any kind would be necessary. With respect to implied authorization, there is no claim that the presence of the CBS camera crew served any legitimate law enforcement purpose.

Agent Mottola correctly asserts that there is no reported decision that expressly forbids searching agents from bringing members of the press into a home to observe and report on their activities. He therefore argues that there was no clearly established rule prohibiting such an act. The argument lacks merit. It has long been established that the objectives of the Fourth Amendment are to preserve the right of privacy to the maximum extent consistent with reasonable exercise of law enforcement duties and that, in the normal situations where

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[7] *See, e.g., Michigan v. Summers*, 452 U.S. 692, 101 S.Ct. 2587, 69 L.Ed.2d 340 (1981) (detaining occupants while search is in progress); *United States v. Barlin*, 686 F.2d 81, 87 (2d Cir. 1982) (limited search of individual on premises as self-protective measure).

warrants are required, law enforcement officers' invasion of the privacy of a home must be grounded on either the express terms of a warrant or the implied authority to take reasonable law enforcement actions related to the execution of the warrant. Mottola exceeded well-established principles when he brought into the Ayeni home persons who were neither authorized by the warrant to be there nor serving any legitimate law enforcement purpose by being there.[8] A private home is not a soundstage for law enforcement theatricals.

The unreasonableness of Mottola's conduct in Fourth Amendment terms is heightened by the fact that, not only was it wholly lacking in justification based on the legitimate needs of law enforcement, but it was calculated to inflict injury on the very value that the Fourth Amendment seeks to protect — the right of privacy. The purpose of bringing the CBS camera crew into the Ayenis' home was to permit public broadcast of their private premises and thus to magnify needlessly the impairment of their right of privacy.

With respect to the second prong of the qualified immunity analysis, an objectively reasonable officer could not have concluded that inviting a television crew — or any third party not providing assistance to law enforcement — to participate in a search was in accordance with Fourth Amendment requirements. Contrary to Mottola's argument, "the very action in question" need not have "previously been

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[8] *Bills v. Aseltine*, 958 F.2d 697 (6th Cir. 1992), cited by the plaintiffs, lends support to the proposition that permitting the presence of a third party not assisting in a search may violate the Fourth Amendment. However, because that decision was rendered after the search at issue in this case, we do not — and need not — rely on it to conclude that the defendant's actions, as alleged, violated law that was clearly established prior to the search.

held unlawful"; rather, the standard to defeat qualified immunity is that "in the light of pre-existing law the unlawfulness must be apparent." *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S. Ct. 3034, 3039, 97 L. Ed. 2d 523 (1987). The contours of the Ayenis' rights were "sufficiently clear that a reasonable official [in Mottola's position] would understand that what he [was] doing violate[d] th[ose] right[s]." *Id.*

We therefore agree with Judge Weinstein (i) that the Fourth Amendment's prohibition on unreasonable searches forbade Mottola's action in bringing the CBS camera crew into the Ayenis' home, (ii) that the right of the Ayenis to be protected under the Fourth Amendment from an agent's bringing into their home persons not expressly nor impliedly authorized to be there, such as a television camera crew, was "clearly established" at the time of the search, and (iii) that Mottola could not with objective reasonableness have believed that his action was consistent with the Fourth Amendment.

2. *Statutory Reinforcement of Unauthorized Persons Claim.* Though our rejection of Mottola's immunity defense rests on well-established Fourth Amendment standards, we find some reenforcement for our conclusion in Federal statutory law, 18 U.S.C. § 3105 (1988), which specifies who may and who may not be on private premises in connection with the execution of a search warrant. That section reads:

> A search warrant may in all cases be served by any of the officers mentioned in its direction or by an officer authorized by law to serve such warrant, but by no other person, except in aid of the officer on his requiring it, he being present and acting in its execution.

18 U.S.C. § 3105.

This statute identifies those who may "serve" a search warrant — only authorized officers and those legitimately assisting the officers, but it has been construed to determine those who may "execute" a warrant. *See United States v. Wright*, 667 F.2d 793, 797 (9th Cir. 1982); *United States v. Clouston*, 623 F.2d 485, 486 (6th Cir. 1980); *United States v. Gervato*, 474 F.2d 40, 45 (3rd Cir. 1973). Though the statute is not determinative of the scope of the Fourth Amendment, it provides some basis for giving content to the Amendment's generalized standard of reasonableness.[9] Courts construing the reach of the Fourth Amendment in light of section 3105 have held that the presence of a third party who is *assisting*

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[9] That the prohibitions of section 3105 may be considered in determining "reasonableness" under the Fourth Amendment is also indicated by the similar treatment the courts have accorded the requirements of the "knock and announce" statute, 18 U.S.C. § 3109 (1988). A majority of circuits that have considered the issue, including the Second Circuit, have concluded that the requirements of section 3109 coincide with the reasonableness requirements of the Fourth Amendment. *See United States v. Lalor*, 996 F.2d 1578, 1584 (4th Cir.), *cert. denied*, ___ U.S. ___, 114 S.Ct. 485, 126 L.Ed.2d 436 (1993); *Rivera v. United States*, 928 F.2d 592, 606 (2d Cir. 1991); *United States v. Andrus*, 775 F.2d 825, 844 (7th Cir. 1985); *United States v. Francis*, 646 F.2d 251, 257-58 (6th Cir.), *cert. denied*, 454 U.S. 1082, 102 S.Ct. 637, 70 L.Ed.2d 616 (1981); *United States v. Baker*, 638 F.2d 198, 202 & n.7 (10th Cir. 1980). Several circuits that do not regard the requirements of section 3109 as coextensive with the Fourth Amendment have nonetheless recognized that the prohibitions are overlapping and serve similar interests. *United States v. Sagaribay*, 982 F.2d 906, 909 (5th Cir.), *cert. denied*, ___ U.S. ___, 114 S.Ct. 160, 126 L.Ed.2d 120 (1993); *United States v. Nolan*, 718 F.2d 589, 600-02 (3d Cir. 1983). Moreover, at least one of the circuits that does not consider section 3109 completely congruent with the Fourth Amendment has concluded that since the requirements are overlapping, an analysis as to whether the Fourth Amendment has been violated may at least *begin* with an inquiry into whether the statute has been violated. *See Unites States v. Stiver*, 9 F.3d 289, 302 (3d Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 1115, 127 L.Ed.2d 425 (1994).

authorized officers in their search does not violate the Fourth Amendment's reasonableness requirement. *See United States v. Clouston*, 623 F.2d at 486-87 (telephone company employees on premises in aid of officers); *United States v. Gambino*, 734 F. Supp. 1084, 1091 (S.D.N.Y. 1990) (confidential informant assisting search); *cf. In re Southeastern Equipment Co. Search Warrant*, 746 F. Supp. 1563, 1577 (S.D. Ga. 1990) (Department of Defense investigator assisting Customs Agent permitted by section 3105); *United States v. Schwimmer*, 692 F. Supp. 119, 126-27 (E.D.N.Y. 1988) (computer expert assisting search permitted by section 3105).

As noted above, Mottola does not contend that CBS was assisting Mottola or any of the other officers in conducting a search. On the contrary, the officers were assisting CBS in producing a television show. Such conduct clearly violated section 3105.

Mottola argues that under the Supreme Court's decision in *Davis v. Scherer*, 468 U.S. 183, 104 S. Ct. 3012, 82 L. Ed. 2d 139 (1984), the violation of a *statute* is irrelevant for purposes of determining whether he is protected by qualified immunity against the claim that he violated the plaintiffs' *constitutional rights*. We disagree. First, we note that the plaintiffs are not suing for violation of section 3105. They seek damages for a violation of the Fourth Amendment, and they have pleaded that violation sufficiently to overcome an immunity defense, wholly apart from any limitations imposed by section 3105. The statute is relevant, not as a standard of liability, but as some guidance on the constitutional issue.

Second, we believe that the defendant reads *Davis* too broadly. In that case, the plaintiff, suing under 42 U.S.C. § 1983, claimed that the Florida Highway Patrol had violated his procedural due process rights by terminating him without a formal pre-termination or prompt post-termination hearing.

Davis, 468 U.S. at 187, 104 S. Ct. at 3016.[10] The due process right to such a hearing had not been clearly established at the time of the plaintiff's dismissal. *Id.* at 187-88, 104 S. Ct. at 3015-16. The Supreme Court held that the plaintiff could not defeat the defendant's qualified immunity by relying on the Highway Patrol's separate violation of a personnel regulation that was unrelated to the due process claim. *Id.* at 188, 193-95, 104 S. Ct. at 3018. In so holding, the Court emphasized that the plaintiff "makes no claim that the [defendants'] violation of the state regulation . . . *bears upon* the claim of constitutional right that [plaintiff] asserts under § 1983." *Id.* at 193, 104 S. Ct. at 3018 (emphasis added). In contrast, a violation of 18 U.S.C. § 3105 at least "bears upon" a claim under the Fourth Amendment.

B. Excessive Measures During the Search

The complaint alleges several respects in which the search was conducted in an unreasonably intrusive manner. Some of these actions are those of Mottola or the agents under his direction. For example, the complaint alleges that Mottola grabbed a magazine out of Mrs. Ayeni's hand and told the plaintiffs to "shut up" when Mrs. Ayeni attempted to cover her son's face, and that the agents broke some furniture in the home. More serious are the allegations that the search was excessively intrusive by reason of the videotaping of Mrs. Ayeni, her son, and their private documents. The complaint alleges that the CBS crew — sometimes at the instruction of the officers — videotaped and recorded the plaintiffs themselves, in spite of the vigorous protests of Mrs. Ayeni

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[10] The same principles of qualified immunity apply in section 1983 actions against state officials and *Bivens* actions against federal officials. *See Butz v. Economou*, 438 U.S. 478, 507, 98 S.Ct. 2894, 2911, 57 L.Ed.2d 895 (1978).

and her efforts to cover her son's and her own face. The complaint also alleges that the CBS crew, following the agents during the search, videotaped the agents searching the interiors of closets, drawers, and desks, and took close-up pictures of personal letters, family pictures, and personal banking and financial statements.

In contrast to searches for "physical objects whose relevance is more easily ascertainable," searches for documents involve at least a cursory review of innocuous and personal papers and effects. *See Andresen v. Maryland*, 427 U.S. 463, 482 n.11, 96 S. Ct. 2737, 2749 n.11, 49 L. Ed. 2d 627 (1976). For this reason, "searches involving documents must be 'conducted in a manner that minimizes unwarranted intrusions upon privacy.'" *Matias*, 836 F.2d at 747 (quoting *Andresen*, 427 U.S. at 482 n.11, 96 S. Ct. at 2749 n.11). The pending case vividly illustrates how a search for documents can lead to the inspection of highly personal items unrelated to the purposes of the search. Here the intrusiveness of such inspection was aggravated by the fact that the needless viewing of private documents was done not only by agents conducting a search but also by unauthorized persons with no business being in the home at all.

The video and sound records were unnecessary to the purposes of the search — to discover material related to an alleged credit card fraud scheme. The Government makes no claim that the search was being videotaped for legitimate law enforcement purposes, such as to verify the location of seized items or to refute claims of improper conduct by the agents during the search. Instead, the purpose of the TV crew's intrusion into the Ayeni home was to seize images and sounds of the Ayeni home, and of the Ayenis themselves, that were intended for public viewing by television audiences across the country. We agree with the District Court that the video and sound recordings were "seizures" under the Fourth

Amendment, and rendered the search far more intrusive than it needed to be. *See Katz v. United States*, 389 U.S. 347, 353 88 S. Ct. 507, 512, 19 L. Ed. 2d 576 (1967) ("the Fourth Amendment governs not only the seizure of tangible items, but extends as well to the recording of oral statements"); *id.* at 360-61, 88 S. Ct. at 516-17 (Harlan, J., concurring) ("electronic as well as physical intrusion into a place that is . . . private may constitute a violation of the Fourth Amendment"); *Silverman v. United States*, 365 U.S. 505, 511, 81 S. Ct. 679, 682-83, 5 L. Ed. 2d 734 (1961). The law was also clear that a search of a home involves an incursion upon one of the most highly protected zones of privacy and that a search involving documents requires that officers "minimize unwarranted intrusions on privacy." All these Fourth Amendment requirements have been defined with "reasonable specificity." *See Soares*, 8 F.3d at 922.

In *Rivera v. United States*, 928 F.2d 592 (2d Cir. 1991), the complaint had alleged that a search had been excessively intrusive and that officials had committed various acts of physical brutality against individuals who, like Tawa and Kayode Ayeni, were not the subjects of the criminal investigation as stated in the warrant. *Id.* at 598-600. In vacating the District Court's judgment that had found the officers' conduct objectively reasonable, we stated:

> Beyond th[e] general authority to detain persons and make limited security searches, . . . there must be probable cause, or at least some degree of particularized suspicion, to justify further searches or seizures of individuals who are neither named in the warrant nor arrested as a consequence of the search.

928 F.2d at 606 (citing *Ybarra v. Illinois*, 444 U.S. 85, 91-94, 100 S. Ct. 338, 342-44, 62 L. Ed. 2d 238 (1979)). We

concluded that "the claims that . . . property was unreasonably destroyed, and that physical treatment was excessively rough or intrusive, raised questions of fact." *Id.* at 607; *see also United States v. Becker*, 929 F.2d 442, 446 (9th Cir.), *cert. denied*, ___ U.S. ___, 112 S. Ct. 183, 116 L. Ed. 2d 145 (1991). We also remanded on the qualified immunity issue, noting that whether defendants had a reasonable belief that "under the circumstances, their actions did not violate [Fourth Amendment] rights, also rests on disputed questions of fact." *Rivera*, 928 F.2d at 607.

In this case, there are similarly unresolved questions of fact. Among the issues that must be resolved at trial are not only the extent of physical force and intrusive measures employed during the search, but whether such measures were justified by the purposes of the search. *See* Akhil R. Amar, *Fourth Amendment First Principles*, 107 Harv.L.Rev. 757, 804 (1994) ("Greater intrusiveness requires greater justification."). The plaintiffs' allegations, if proved, may be sufficient for a fact-finder to conclude that the officers' conduct violated clearly established Fourth Amendment law. *See Rivera*, 928 F.2d at 606-07; *Tarpley v. Greene*, 684 F.2d 1, 9 (D.C. Cir. 1982) ("destruction of property that is not reasonably necessary to effectively execute a search warrant may violate the Fourth Amendment."). If the plaintiffs' Fourth Amendment rights were violated by the use of physical force and the intrusiveness of the search, it would still remain for the fact-finder to determine whether it was objectively reasonable for Mottola to believe that his conduct in this regard, under the circumstances, did not violate the plaintiffs'

Fourth Amendment rights. *See Oliveira v. Mayer*, 23 F.3d 642, 649-50 (2d Cir. 1994); *Rivera*, 928 F.2d at 607.[11]

We note, however, that the seizure of a photograph during the course of the search was permissible if the photograph was intended to be used later to identify the defendant, as Mottola claims. *Cf. Texas v. Brown*, 460 U.S. 730, 739, 103 S. Ct. 1535, 1541-42, 75 L. Ed. 2d 502 (1983) (plurality) (permitting seizure of relevant evidence under "plain view" doctrine during *warrantless* search); *United States v. Diecidue*, 603 F.2d 535, 559 (5th Cir. 1979) (same), *cert. denied*, 445 U.S. 946, 100 S. Ct. 1345, 63 L. Ed. 2d 781 (1980). Since Mrs. Ayeni's husband was the suspected perpetrator of the criminal activities that were the subject of the search, a single photograph of him for identification purposes would have been relevant evidence within the legitimate scope of the warrant.

C. Entry and Detention Prior to Obtaining the Warrant

The plaintiffs allege that they were illegally detained and that their apartment was searched intermittently for nearly two

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[11] These issues regarding the extent of the use of physical force and the intrusiveness of the search are distinct from the issue of the presence of unauthorized persons discussed earlier in this opinion; as to that issue the only question remaining for the jury is whether defendant Mottola played a role in permitting the CBS news crew to be present at the search. Because there are no unresolved material questions of fact as to whether Mottola is entitled to qualified immunity regarding the invitation to CBS (Mottola does not contend, for example, that CBS was legitimately assisting in the search), the qualified immunity defense to that claim should not be submitted to the jury. *See Oliveira*, 23 F.3d at 649. Nor need the jury consider a qualified immunity defense to Mottola's liability for any aspect of the conduct of the TV crew since the unavailability of this defense to the claim based on the presence of the crew subsumes their conduct in the home.

hours before the warrant was signed by the Magistrate Judge. In *Segura v. United States*, 468 U.S. 796, 104 S. Ct. 3380, 82 L. Ed. 2d 599 (1984), the Supreme Court indicated that an officer who knows that others, in good faith, are in the process of obtaining a warrant may secure a residence from within and, when necessary, may detain its residents for a reasonable period in order to "preserve the status quo," without violating the Fourth Amendment's proscription against unreasonable *seizures*. *Id.* at 798, 104 S. Ct. at 3382 (1984); *see also United States v. Crespo de Llano*, 838 F.2d 1006, 1016 (9th Cir. 1987); *cf. United States v. Berrett*, 513 F.2d 154, 155 (1st Cir. 1975) (officers remaining in open garage until search warrant obtained were not conducting warrantless search since they did not exercise dominion over property in garage before warrant was executed.) But the Court in *Segura*, distinguishing between a *search* and a *seizure*, and noting that a limited search had taken place before the warrant had been obtained, stated:

> The [Second Circuit] Court of Appeals affirmed the District Court's holding that there were no exigent circumstances to justify the warrantless entry into petitioners' apartment. That issue is not before us, and we have no reason to question the courts' holding that that *search* was illegal.

Segura, 468 U.S. at 798, 104 S. Ct. at 3382 (emphasis in original).[12] The Supreme Court thus left undisturbed this Court's holding that the entry and search that had occurred before the warrant was obtained, and in the absence of exigent

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[12] The principal holding in *Segura*, not relevant here, was that evidence obtained *after* the issuance of, and pursuant to, a valid warrant need not be suppressed, even where an illegal search took place prior to the issuance of the warrant. *Id.* at 814, 104 S.Ct. at 3390.

circumstances, violated the Fourth Amendment. *See United States v. Segura*, 663 F.2d 411, 414, 417 (2d Cir. 1981), *limited on other grounds, United States v. MacDonald*, 916 F.2d 766, 772 (2d Cir. 1990) (in banc) ("To the extent that *Segura* may be interpreted to extend this underlying rationale [that officers' conduct may not create exigent circumstances] beyond illegal conduct, we repudiate such an expansive approach."), *cert. denied*, 498 U.S. 1119, 111 S. Ct. 1071, 112 L. Ed. 2d 1177 (1991); *see also United States v. Napue*, 834 F.2d 1311, 1326 (7th Cir. 1987) (only exigent circumstances can justify an entry and search prior to obtaining a warrant.) Hence, clearly established law prohibited entry and search of the Ayeni home prior to the issuance of the warrant, in the absence of exigent circumstances. Whether plaintiffs have any viable claim arising from their alleged detention, prior to issuance of the warrant, cannot be decided without fact-finding. We do not know at this stage precisely what restraint, if any, was imposed on the occupants, or whether any restraint exceeded the bounds of reasonableness.[13]

Mottola contends that whatever the state of the law regarding entry and search in advance of obtaining a warrant,

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[13] *Segura* validates only the metaphysical "seizure" of the contents of the apartment that the Court was willing to assume had occurred immediately upon the officers' unlawful entry; that "seizure" of contents, arising from the officers' exercise of dominion and control, was deemed reasonable under the circumstances. However, the Supreme Court had no occasion to review the holding of the District Court, affirmed by the Second Circuit, that the seizure of a person within the apartment was unlawful. It was that seizure that resulted in the suppression of evidence seized in a search incident to the arrest. Perhaps the rationale of *Segura* would permit minimal restraint upon by-stander occupants of premises to prevent them from destroying evidence or otherwise interfering with a search, but it suggests no general authority to impose detention upon those for whom the Government lacks probable cause to arrest.

he cannot be liable for damages on that ground since it is undisputed that he was not among the officers who entered the Ayeni home before the warrant was issued. However, the complaint, fairly construed, indicates that officers at the Ayeni home were communicating with unknown persons elsewhere, see Complaint at ¶¶ 28-29, and Tawa Ayeni's affidavit specifically alleges that the officers who were at her home prior to the issuance of a warrant were communicating with others by radio, *see* Tawa Ayeni Affidavit at ¶ 4. The search warrant itself provides some indication that Mottola may have been coordinating the search efforts, as the document specifically names only Mottola.

Hence, material issues of fact remain as to whether Mottola authorized, coordinated, or participated in either the planning or the execution of the initial warrantless entry into the Ayeni home. If so, the fact-finder must determine whether officers merely entered to "maintain the status quo," without initiating a search, while other officers were acting in good faith to obtain a warrant, or whether, as the plaintiffs allege, the home was searched prior to the issuance of the warrant. Finally, if the home was searched and the defendant seeks to justify such a warrantless search on exigent circumstances, the fact-finder should determine whether such circumstances existed to justify any warrantless search that occurred in this case.

II. The Substantive Due Process Claim

The plaintiffs' contention that the defendant's conduct was so offensive as to "shock the conscience" and therefore violate Fifth Amendment substantive due process is unavailing. After *Graham v. Connor*, 490 U.S. 386, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989), and *Albright v. Oliver*, ___ U.S. ___, 114 S. Ct. 807, 127 L. Ed. 2d 114 (1994), it is doubtful that any plaintiff may pursue a Fifth Amendment substantive due

process claim based on the same facts as alleged in a Fourth Amendment unreasonable search claim. In the context of an excessive force claim arising in the course of an arrest, investigatory stop, or other seizure of a person, the Supreme Court has explained that "[b]ecause the Fourth Amendment provides an explicit textual source of constitutional protection against *this sort of physically intrusive governmental conduct*, that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims." *Graham*, 490 U.S. at 395, 109 S. Ct. at 1871 (emphasis added). More recently a four-member plurality generalized this observation by quoting it with the substitution of the words "a particular sort of government behavior" for the words "this sort of physically intrusive governmental conduct." *Albright*, ___ U.S. at ___ , 114 S. Ct. at 813 (opinion of Rehnquist, C.J., with whom O'Connor, Scalia, and Ginsburg, JJ., join). Justice Souter, concurring in the judgment, appears to provide a fifth vote for the proposition that substantive due process is unavailable as a restraint on conduct regulated by the Fourth Amendment. *Id.* ___ U.S. at ___-___, 114 S. Ct. at 819-22.

Even if any room remains for a substantive due process claim with respect to the conduct of a search and seizure, plaintiffs' complaint, while alleging conduct that may exceed Fourth Amendment reasonableness, does not allege conduct that "shocks the conscience" for Fifth Amendment purposes to the extent that it was not objectively reasonable for Mottola to believe that his actions were within such outer limits. *See, e.g., Lowrance v. Achtyl*, 20 F.3d 529, 537 (2d Cir. 1994) (substantive due process protects against Government action that is arbitrary, conscience-shocking, or oppressive in a constitutional sense, but not against action that is incorrect or ill-advised).

Conclusion

The complaint sufficiently alleges Fourth Amendment violations to withstand a motion to dismiss based on qualified immunity. The order of the District Court is affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

BABATUNDE AYENI et al., Plaintiff, -vs- CBS INC. et al., Defendant.	CV-93-957 United States Courthouse Brooklyn, New York January 18, 1994 11:00 o'clock a.m.

TRANSCRIPT OF MOTION
BEFORE THE HONORABLE JACK B. WEINSTEIN
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiffs: ROSSBACHER & ASSOCIATES
By: HENRY H. ROSSBACHER, ESQ.
and
HARRY BATCHELDER, ESQ.
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For Defendant Mottola: STEVEN F. McGRAW, ESQ.

For Defendant CBS:

ROGERS & WELLS
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MADELEINE SCHACHTER, ESQ.
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Proceedings recorded by mechanical stenography, transcript produced by Computer-Assisted Transcription.

Civil case for motion: Babatunde Ayeni -vs- CBS, Inc.

Counsel, note your appearances, please.

THE COURT: Good morning counsel.

MS. SCHACHTER: Madeleine Schachter and David Schulz for CBS.

MR. McGRAW: Steven F. McGraw for defendant Mottola.

MR. ROSSBACHER: Harry Batchelder and Henry Rossbacher for plaintiffs.

THE COURT: Yes, I will hear the motions.

MS. SCHACHTER: CBS moved to dismiss all but one of the state law claims because plaintiffs, we believe, have no viable federal claim. The plaintiffs should not invoke this court's federal jurisdiction, they seek to extend *Bivens* liability.

THE COURT: I remember this case very well.

MS. SCHACHTER: I had confidence in your Honor.

No footage in issue in this case has been broadcast. The essence of the plaintiffs' claim is that CBS violated the plaintiffs' Fourth and Fifth Amendment rights, but there are no pled allegations that CBS knowingly violated any well-established constitutional right of the plaintiffs.

There's no Fourth Amendment viable claim here. The plaintiffs do not cite a single case because there is a non-showing that the conduct at issue constitutes a violation of their constitutional rights.

THE COURT: Well, supposing we said it did?

MS. SCHACHTER: I'm sorry?

THE COURT: Supposing we said it did violate constitutional rights? You say they are not well-established until I speak.

MS. SCHACHTER: Every court that has considered this conduct has rejected plaintiffs' efforts to impose constitutional liability on a press defendant, and it certainly doesn't violate the substantive core right of the Fourth Amendment.

THE COURT: Don't we have defendants who are government employees in this case?

MS. SCHACHTER: I'm simply appearing here for CBS and Meade R. Jorgensen.

THE COURT: Don't we have jurisdiction over them arguably?

MR. McGRAW: One federal defendant before the court, your Honor, yes.

THE COURT: At least that one that was, and your theory having obtained jurisdiction that even though you are closely related in the transaction, you can't use that to shoehorn jurisdiction over an individual defendant?

MS. SCHACHTER: Well, your Honor, not only do we contend that there's no established constitutional right, no invasion of recognized right under the Constitution. In terms of your reference to us being closely related, the plaintiffs' principal argument in trying to satisfy their requirement to show that CBS was a state actor is that somehow we engaged in joint action with the government.

It is clear that the government and CBS in this case were engaged in independent pursuits.

THE COURT: I don't know about that.

MS. SCHACHTER: The government was fully responsible for the search for evidence of alleged criminal conduct.

They alleged conspiracy between government employee and CBS. They alleged conclusory allegations of conspiracy, but there's no question that the government was fully responsible for determining whether to search, when to search, obtaining the warrant, what would be searched. CBS did not search, did not participate in the search, did not instruct that anything be searched or not be searched; and, conversely, the government did not participate in any of CBS' bailiwick.

There was no agreement with the government that there would be a broadcast, let alone what the contents of the broadcast would be. That the government, for example, asked

for a copy of the videotape, CBS would not have provided it, absent your Honor's order requiring us to do so.

There was no agreement —

THE COURT: Well, that order was issued at the request of the defendant.

MS. SCHACHTER: Yes, your Honor, but had the government without motion practice or subpoena demanded a copy of the videotape, CBS would not have produced it. There was no agreement with the government.

In fact, had the government engaged in misconduct during the course of this search, CBS undoubtedly would have regarded that to be newsworthy, and at that point neither the government nor CBS would have been aligned, they would have been antagonistic against one other.

THE COURT: You make a very strong point, but I'm not inclined to grant any motion to allow you out of the case, because I think the case is going to have to be tried, the facts will have to be fully elucidated, and it will certainly go up to the Court of Appeals, and possibly up to the Supreme Court. Since there are serious continuing constitutional issues involved, it seems to me the Supreme Court is entitled to a full record.

I agree with you, it is a very difficult case on jurisdiction.

MS. SCHACHTER: Your Honor, if I may. The plaintiffs not only haven't established that there was a well-established constitutional right, but they also haven't established a knowing violation.

THE COURT: By who?

MS. SCHACHTER: By CBS. Every case that was considered — every court to have considered —

THE COURT: But the knowing violation by the government employee hasn't been established you say.

MS. SCHACHTER: No, I'm simply here representing CBS and its producer Meade Jorgenson.

THE COURT: I understand, but if there was a knowing violation by the government agent and you conspired with him, why shouldn't you be deemed for this purpose as if you were in the same position as he was?

MR. SCHULZ: Judge, if I may. The issue of a knowing violation goes to the status of the case law, and what the officers and what CBS reasonably understood at the time this was done. Every court that had considered this issue about whether there was a constitutional problem in bringing the press along on a search up to the time of the search —

THE COURT: Break-in in cases?

MR. SCHULZ: — said no.

THE COURT: Inside cases, too. Most of the cases are outside cases.

MR. SCHULZ: There were three cases.

THE COURT: Outside the apartment?

MR. SCHULTZ: There were three cases that had considered it, at least we are aware of, and every single one of them said there's not a constitutional violation.

The only Court to allow it, the facts to be developed, was the Sixth Circuit, a late-decided case after this, but even in that case they said as to the private parties there's not a Fourth Amendment violation here, but would opt to go to the jury.

THE COURT: What did they do — did they dismiss?

MR. SCHULZ: The private party was out of the case. That was a different case, Judge, because the private party there was acting on behalf of a corporation that was looking for stolen goods, so they were really looking to bring in someone to look for the —

THE COURT: It is a fascinating case which impinges on First Amendment and Fourth Amendment rights.

MS. SCHACHTER: We respectfully submit it impinges on the First Amendment.

THE COURT: I said that.

MS. SCHACHTER: If I may? *Murphy -vs- Plain Dealer*, 1991, the Northern District of Ohio actually imposed sanctions on the plaintiff for the frivolity of the lawsuit brought against the press, because they allegedly wrongfully conspired under Section 1983, allegedly they wrongfully conspired with the police officials by learning information about the search warrant. The Court regarded this to be so far afield from the line of decisions set forth in *Paul -vs- Davis* that the District Court imposed sanctions on the plaintiff's counsel in this case because amongst other reasons the challenged conduct was not within the protected zones of privacy.

To the extent there was decisional law available to the press prior to the search as to what would or would not constitute constitutionally impermissible conduct, the imposition of sanctions is highly instructive on that point.

THE COURT: Not to me because some courts are fast on the trigger with sanctions under Rule 11, I'm not.

MS. SCHACHTER: In *Jones against Taibbi* in the Distinct Court of Massachusetts, there the press reporter and the law enforcement "agents struck a bargain." There was an actual bargain between them that the reporter would refrain from broadcasting the report until the suspect was arrested in return for a "front line vantage point at the arrest itself," and the Court —

THE COURT: The arrest was inside the house?

MS. SCHACHTER: It is not clear from the opinion of the Court where the arrest occurred.

THE COURT: It seems to me that that kind of distinction is fairly critical in this case. They shouldn't do these things, the government. They do them all the time, we know, because they want the press, probably a violation of ethical rules, as well as constitutional rules. But if it is outside, that's one thing, but if you come into the house, that's another.

MS. SCHACHTER: When CBS entered the house, to the extent CBS transgressed plaintiffs' rights, CBS now, not the government, to the extent CBS transgressed their rights, CBS did so, it constituted an alleged trespass. We don't think plaintiffs will be able to prove that trespass claim.

THE COURT: I understand the jurisdictional problem.

MS. SCHACHTER: But the plaintiffs here are literally making a federal case out of a state trespass claim, and the Supreme Court cautioned that *Bivens* liability should not supplant traditional tort law.

We understand your Honor's reaction to CBS' conduct.

THE COURT: I don't have any reaction to it. I don't, I don't care one way or the other.

MS. SCHACHTER: It is no reflection on either the breath of the Constitution or the importance of traditional tort law to say that they don't address the same concerns.

To the extent that CBS and Mr. Jorgensen transgressed the plaintiffs' rights, they did so because they entered the apartment, that may be a trespass claim, and they may be able to prove that claim depending on their proofs. We, of course, dispute that claim, but there are issues of facts lurking there now.

THE COURT: What statute now applies to these state claims which are attendant on federal claims?

MS. SCHACHTER: In terms of jurisdiction, your Honor? It is my understanding if there's no federal question jurisdiction.

THE COURT: Assuming there's federal question as to some claimants and it is all part of the same transaction, is there a statute?

MS. SCHACHTER: My understanding is that then your Honor may entertain supplemental jurisdiction over the state law claims.

THE COURT: You didn't understand my question.

MS. SCHACHTER: Apparently not, I'm sorry.

THE COURT: Where the federal claim is not against the person against whom the state law claim is asserted, which is your case?

MS. SCHACHTER: It is my understanding that to the extent that the federal claims were to be permitted to be advanced exclusively against the government and not CBS, your Honor could entertain supplemental jurisdiction over the CBS defendants, if it so chooses, I believe, although I haven't recently looked at the statute.

THE COURT: Have you briefed this issue? Because they just amended the statute a few years ago and it is quite ambiguous, I think. But if you make that concession, aren't you conceding you are not entitled to a dismissal?

MS. SCHACHTER: We are entitled to the dismissal of the *Bivens* claims asserted against the CBS defendants.

THE COURT: You are not moving to dismiss the state claims?

MS. SCHACHTER: We moved to dismiss the state law claims with the exception of the trespass claim on the failure of cognizable — they have asserted claims of conversion and two emotional distress claims, intentional infliction and negligent infliction.

THE COURT: Why haven't you moved all of the claims on the grounds that the federal claims only stand against the individual? I though you had.

MR. SCHULZ: Our motion is there's no federal action against CBS and, therefore, —

THE COURT: That's what I thought.

MS. SCHULZ: Then there's a further request, some of them are inadequate.

THE COURT: Supposing they were adequately stated?

MR. SCHULZ: They should still be dismissed.

THE COURT: Because there's no federal claim against CBS?

MR. SCHULZ: It would be the tail wagging the dog to keep the state claims here, if there's no federal claim against CBS.

MR. ROSSBACHER: Your Honor, first, we believe that there was a well-established constitutional right. It is established in several places.

Congress in 1974 enacted, and I quote: Congress finds that the right of privacy is a personal and fundamental right protected —

THE COURT: Excuse me for just a second.

Yes?

MR. ROSSBACHER: Your Honor, in the Privacy Act 5 U.S.C. 552A, Congress found there was a fundamental right of privacy protected by the Constitution of the United States, echoes the Fourth Amendment, and in fact it enforces it.

In *Schwimmer*, by this district, in the Eastern District, which is a published decision, which also cites *Clouston*, which is a Sixth Circuit decision, *Clouston* was a case in which a search was held to be unconstitutional because there had been a violation of Section 3105, which we believe is a constitutional rule which is that the government is authorized, and it's a violation of the Fourth Amendment, to take with it someone who is not necessary to the service or execution of a search warrant.

In *Clouston*, which is published, which precedes bills, the Court said: No, there was no violation of Section 3105 and, therefore, there was no violation of the Constitution, because in fact the people taken along were necessary to the execution and service of the search warrant.

Our position is since at least *Clouston*, since the Fourth Amendment was enacted, it has been absolutely clear that if in fact an unauthorized person is taken along on a search, that's a violation of the Constitution, violation of Section 3105, and it's violation of Title 18, Section 2234, which makes it the a crime, literally a federal crime, for an agent to exceed the authorization of a search warrant. We believe that these are explicitly constitutional rights.

As a Professor in Virginia named Tom Bergen, a famous professor, he said he was almost ruined by Yale, never taught him to read a statute, always wanted to talk about common-law and purposes.

The fact of the matter is Congress spoken definitely in 3105 and 2134, protected and implemented the constitutional right, which is their right, just as they did in the privacy right of 1934. They said, if you exceed the authorization of a search warrant, you've violated federal law and you committed a crime.

We have alleged, because I think with greater clarity as we can, your Honor, CBS entered into a conspiracy with the Secret Service apparently against the obstruction to the United States Attorney's Office to violate these laws, to violate the Fourth Amendment, and that was clear.

Clouston and *Schwimmer* were in fact on the books. We also think that they violated the Fifth Amendment. *York -vs- Story*, which is interestingly enough cited by our opponents, and we thank them for it. It is a case where a police officer, when a lady complained, took her into a dressing room, made her undress, took photographs of her and then distributed them. We think that this case is like that.

You will remember the tape. You will remember Mrs. Ayeni in her negligee in essence protested against being filmed, holding a magazine to her face, but being filmed at various times by this camera man Mr. Smith. She had to respond to the agent's requests. This was after apparently she had been mirandized, after there had been a forcible entry into the apartment, before in fact —

THE COURT: Well, let's assume that I have jurisdiction over the individual — a federal employee?

MR. ROSSBACHER: Yes.

THE COURT: Do I have jurisdiction over the CBS?

MR. ROSSHACHER: Under *Ruber*, your Honor, which we cited to you, we think you absolutely do. It is clear in —

THE COURT: Supposing I say there's no federal cause of action, but just on the state cause of action. Do I have jurisdiction?

MR. ROSSBACHER: Yes, your Honor.

THE COURT: On what theory?

MR. ROSSBACHER: We read the supplemental jurisdiction statute, which changed, as I understand it, the pendent jurisdiction rule. The supplemental jurisdiction rule makes it clear, as I understand it, for the Court for judicial economy in its discretion could keep the claim. We think there's no basis to dismiss the federal claims here. In fact, if you did, we think you can keep the state cause of action.

Admittedly, the statute is new and there are not many cases on it, but we believe that the purpose or in part the supplemental jurisdiction change was to end the practice of having substantial proceedings in a federal court, and splitting up the case, sending part to state or part to federal.

There's no question you have jurisdiction over Mottola. I don't think there's any question you have jurisdiction over 53(b) is where they agreed and conspired. The Supreme Court, we cited all of the cases, the Supreme Court seems to have made it clear that private parties acting with government parties can be made the subject of a *Bivens* claim, just as they could be made the subject of a 1983 action and, in fact, Judge Bork, thought he would be Justice but didn't get there, in the case cited in our reply brief, has gone so far as to state the qualified immunity rule, where the government enlists the private party.

They may be able to shelter behind the governmental immunity, but where the private party enlists the government actor i.e. bribing the Judge, he states that ruling apparently approved by Judge Wald, since she cites to Judge Bork's discussion in her majority opinion, says that then the private party cannot shelter behind the government immunity, but is still before the Court.

So, you can have the situation where the government employee is gone, but in a *Bivens* conspiracy, that was the First Amendment conspiracy to fire a man because he had a — that the government didn't like, you can have a situation where you have a *Bivens* conspiracy, shelter behind some kind of immunity and the private party going forward, and that's exactly what you had in the case where the Federal Judge had absolute immunity and got out, and the bribers were there, stuck before, before the federal court, which is exactly where everyone wanted them, and where they ought to be.

THE COURT: All right. Well — you want a brief response? I would like to permit you more time, but I have another matter and a trial going.

MS. SCHACHTER: I will be brief. I wanted to indicate CBS indicated that even if plaintiffs could state some viable constitutional claim against CBS, the qualified immunity doctrine comes into play. CBS believes it can invoke this doctrine.

I wanted to mention to your Honor *Wyatt -vs- Cole*, a recent Supreme Court case, 112 Supreme Court 1827, decided in 1992, which very narrowly denied qualified immunity to a private party seeking to invoke a state replevin statute, which is obviously a different situation, and looked at very different policy rationales and a different legal predicate for the claim.

But, most significantly, you know, like here, that case was held not to apply to a private party who allegedly was controlling the government.

Here the plaintiffs, contrary to their statements here, have pled in their complaint that the government was controlling CBS and directing its conduct, and then under those circumstances qualified immunity would apply.

The right asserted here by the plaintiffs clearly was not defined with reasonable specificity. There's no case that we have found or that the plaintiffs have cited that says that this conduct violates the Fourth Amendment or the Fifth Amendment, and they are seeking to bring it in, to the extent they are trying, to argue that CBS invaded a protected zone of privacy. Clearly, that's unavailing to them because to the extent they can establish a substantive core right, neither should they be able to claim that this claim lurked in the interstices somewhere in the penumbra of the Constitution derivatively. Every court to have considered this conduct *Prahl*, *Moncrief* and *Higbee* specifically rejected the plaintiff's efforts to impose constitutional liability on the press.

The plaintiffs' arguments here about Section 3105, and some of the plaintiffs arguments are advanced, I believe for the first time here today, to the best of my recollection — even under the Privacy Act still is directed to their claims, not against CBS, but against the government.

What's more, *Davis -vs- Scherer*, a U.S. Supreme Court case, has specifically admonished even a violation of a statute is insufficient. In order to prevail, plaintiffs must show a knowing violation of a well-established constitutional right, as to CBS they haven't done that.

THE COURT: You don't have to have a case in order to have a well-established right, something can be so obvious that you don't need a case.

MR. ROSSBACHER: Your Honor, if I may respond?

THE COURT: And I respect my distinguished sister and brother judges, but what may be obvious in Brooklyn, may not be obvious in Ohio.

MS. SCHACHTER: To the extent that the plaintiffs seek to bring this within the *York* case, this is different. CBS was engaged in its constitutionally protected news gathering activities. CBS did not go into their apartment for prurient sport to circulate photographs and circulate pictures, as was the allegations in the *York* case. CBS was engaged in news gathering.

THE COURT: That doesn't strike me as very persuasive. You can engage in news gathering and authorize somebody to shoot somebody in order to shoot a guard so that can you photograph, but that wouldn't immunize you against the criminal act for shooting the guard.

MS. SCHACHTER: Exactly. But it would — not that it would — immunize you, but we understand that courts have suggested that there may not be an automatic privilege against the press, to be asserted by the press when crimes or torts are asserted against them. But when the press is engaged in constitutionally protected activity, no Court has imposed constitutional liability, or in *Bivens* liability against the press.

THE COURT: Well, that is not decisive. This could be the first case.

Motion dismissed with leave to renew.

MR. McGRAW: On behalf of the federal defendant, your Honor. There are four claims against the secret service agents.

First of all, they were making the claim it was a violation of the Constitution to bring along CBS on the search. They are also claiming that the search itself was conducted in an offensive, discriminative manner, and they are also claiming detention of the plaintiffs in the apartment during the pendency of the search was unlawful.

Plaintiffs also contend that defendant Mottola is somehow responsible for an entry in securing of the apartment prior to the signing of the warrant, even though he was not present at the time and in no way authorized the conduct at issue.

That last question could be disposed of rather briefly, in as much as it is undisputed in the record that defendant Mottola had nothing to do with what happened before he arrived at the scene of the apartment.

MR. ROSSBACHER: Respectfully, we disagree. We allege he was supervising the entire operation.

MR. McGRAW: It is clear from the constitutional cases involved that a federal defendant cannot be held on the basis of respondeat superior.

THE COURT: The discovery has not been completed, and we don't know when your client began negotiations with CBS, whether this particular choice of search and seizure was designed in part for CBS' convenience and to make a better publicity case. We don't know when he got involved in it. If he was the supervising agent, he would normally be involved in deciding whether a search warrant was to be sought and whether a search would be conducted.

I think there was evidence, wasn't there, that he shepherd CBS around and could have the cut them off at a time, once they were in the apartment and while they were leaving, but my recollection may be faulty.

MR. McGRAW: Your Honor, for purposes of defendant Mottola's motion to dismiss, we accept all of the allegations in the complaint as true. We nevertheless contend they completely failed, as they are required to do under the doctrine of qualified immunity, to allege a violation of clearly established constitutional right.

THE COURT: Well, it's established or not is an issue. The Supreme Court says it is clear —— it's clearly established.

MR. McGRAW: Your Honor, the Second Circuit has made it explicit with regard to the case law required, that to establish that right there has to be a Supreme Court case or Second Circuit case.

THE COURT: That doesn't make any sense. It simply doesn't make any sense if something is so clear that nobody has ever dared to bring a case.

MR. McGRAW: Your Honor ——

THE COURT: Then it could be a clear right.

MS. SCHACHTER: Respectfully, they have dared. They dared and they failed.

THE COURT: Not in this Circuit. Not in the Supreme Court. You have Ohio and Massachusetts, they are imminent courts, and the Sixth Circuit.

MS. SCHACHTER: We refer to the other cases. They dared and they failed, constitutional liability could not be imposed on the press in those situations.

THE COURT: It may be.

MS. SCHACHTER: Even plaintiffs concede this is not a well-established constitutional right. They say in their papers there's been a urgent need to clarify and settle the law.

MR. McGRAW: The plaintiffs seem to fundamentally misunderstand the qualified immunity alleging that the right to be free from unreasonable searches and seizures was clearly established at the time.

In fact, the Supreme Court in *Anderson -vs- Creighton* has required that the right at issue must be clearly established in a more particularized sense than that. They have to be granted not a case on point necessarily, but at least the case law must be such that a reasonable official confronted with circumstances, such as those at issue here, would realize that his conduct violated the constitutional rights of the plaintiffs.

THE COURT: I understand all of that, but we'll develop a full record. I will make a decision after the full record is made, and then you can go on your way up.

MR. ROSSBACHER: Your Honor, we move for summary were judgment on the basis of collateral estoppel.

THE COURT: Denied. You are not entitled to any summary judgment on the basis of collateral estoppel. The case is week enough.

MR. ROSSBACHER: I take it we go on to discovery?

THE COURT: I think so.

MR. ROSSBACHER: Thank you, your Honor.

MR. McGRAW: Regarding the motion to dismiss that we have raised. We are entitled under the decision of the Supreme Court to a decision yea or nay on the sufficiency.

THE COURT: I'm making the decision they are sufficient. You are not entitled to it. In order to avoid wasting your time, and in order to avoid the burden on defendants who are entitled to some form of immunity, and I am deciding you are not entitled to it. In some instances you can seek mandamus or even appeal. You may have an appeal or you may have mandamus.

MR. ROSSBACHER: Your Honor, I take it the motion made by the government to stay all of the discovery in this case is denied?

THE COURT: Denied.

MR. ROSSBACHER: Thank you.

MR. McGRAW: I'm appearing for the government.

THE COURT: I thought you were for the individual defendant?

MR. McGRAW: The United States is not a party in this lawsuit. The only federal defendant before the Court is the Secret Service.

THE COURT: Are you able to stay on behalf of the government or individual defendant?

MR. McGRAW: We move to stay all of the discovery until there's a ruling on defendant Mottola ——

THE COURT: I'm denying it. I'm asking you, in what the capacity are you moving for the stay?

MR. McGRAW: We are moving for the stay on behalf of defendant Mottola.

THE COURT: I see, not on behalf of the United States?

MR. McGRAW: Your Honor, although we are moving to stay all discovery, whether against the United States or ——

THE COURT: All I want to know is, whose capacity are you moving, and is it on behalf of this defendant?

MR. McGRAW: That's correct, your Honor.

THE COURT: If the government were moving, the government might have an independent right to appeal, but since it is this defendant, it is denied.

Now, I think you may have a mandamus action here.

MR. McGRAW: There's not a mandamus right, but there's a right of immediate appeal.

THE COURT: That's what I thought, and you may have mandamus on the stay as well.

MR. McGRAW: Will your Honor be issuing a written opinion?

THE COURT: Not at this time, I'm just too busy, but I think the record is clear enough.

I will issue an opinion when and if we go ahead and decide it.

MR. McGRAW: Is the motion then denied as of now, your Honor?

THE COURT: It is denied in all respects, no costs, disbursements and no Rule 11 sanctions. There were no frivolous actions to date in this case.

Okay. Thank you.

MS. SCHACHTER: Thank you, your Honor.

THE COURT: I hope I do have an opportunity to write on it. But it may be the Court of Appeals will deny me that pleasure.

Will one of your order immediate copy so that we can have it for the Court of Appeals?

MS. SCHACHTER: Yes, your Honor.

MR. McGRAW: With regard to immediate appeal, if we were to file a protective order of appeal in this case, given denial of our motion to dismiss, under the law as it stands now it would divest the District Court of jurisdiction over the matter. So discovery should not proceed until the appeal is decided.

THE COURT: I don't think it does divest the Court of discovery, that's not the normal practice. The normal practice would be for you to move to stay in the Court of Appeals.

Normally, I would refer the motion for a stay of discovery to the Magistrate Judge under our practice, but in order to save all of that time and effort, I will decide it myself, and I don't think there's an automatic stay of discovery, but you would know better than I.

It seems to me the safest thing to do would be to ask the Court of Appeals for a stay, and if you would like, I will stay discovery for 20 days to permit you to make that application.

MR. McGRAW: Please, your Honor.

MR. ROSSBACHER: Your Honor, I'm here from California. We have depositions on 30(b)(6) of the Secret Service tomorrow at nine and one. This motion was only sent to us on the 12th, although we served them on the 4th, and I'm here at relatively great expense.

I would like those depositions to go forward. They are for documents and for 30(b)(6) of non-parties.

THE COURT: Well, what we can do, I suppose, is stay it on condition that if discovery goes forward and you have to come back again, the government will pay your transportation expenses, that seems to me reasonable. But I do think the government and CBS should be entitled to a crack in the Court of Appeals. The Court of Appeals is not ignorant in the granting of stays against this Court.

MR. ROSSBACHER: We don't think there's any authority to stay discovery against CBS, and that's what this discovery is.

THE COURT: Sure there is. If we throw the case out against the individual, CBS goes with it.

MR. ROSSBACHER: I'm not sure that is true, your Honor, under the qualified immunity doctrine.

THE COURT: I understand. Would you stipulate to that for the government, that will give you your twenty days, but it is rather unfair to have brought him in and then have him go back. It is an individual plaintiff.

MR. McGRAW: Your Honor, our position is that we raised the motion for a stay of protective order staying all discovery with due promptness after receiving their discovery papers, and it is our position that the Supreme Court said discovery shall not commence until sufficiency of the allegations are determined, whether that be on appeal or in the District Court. Therefore, it is our position that the facts they come out here and argue this motion and would like to take discovery at the same time.

THE COURT: I think you are probably right.

MR. SCHULZ: There also is New York counsel representing the plaintiffs.

MS. SCHACHTER: The plaintiffs are from Brooklyn, as we understand it.

THE COURT: Yes, I know, I saw the attorney.

MR. ROSSBACHER: Your Honor, in all candor, CBS made no motion, has no grounds to make any motion. This discovery is going to be relevant to state law claims as well as federal law claims. This case is not going to disappear, no matter what the Second Circuit says.

THE COURT: I know, but the individual government employees should be entitled to appear at those discovery

sessions, and his position is he doesn't want to appear, and I think there's merit to it, until they decide this issue in the Court of Appeals.

MR. ROSSBACHER: Here's my problem, no one will tell me who the other agents were, the agent who wore the mike.

THE COURT: Oh, well, you can get that. Why don't you give him that?

MR. McGRAW: Your Honor, the plaintiffs are welcome —— are entitled at some point to serve a subpoena upon the United States ——

MR. ROSSBACHER: We have.

MR. McGRAW: —— to seek identification of the agents involved, and we are not going to try to stonewall.

MR. ROSSBACHER: We did that January 5th, your Honor, and he waited a week, then came in here and moved for a stay.

THE COURT: Why don't you give him the names so at least they can go forward in preparing possible other actions?

MR. McGRAW: Your Honor, I will certainly confer with the Secret Service and see that can be arranged. However, it is our position that all discovery, including the identities of the individuals involved ——

THE COURT: No, if CBS is a defendant, the government would be a —— could theoretically be a non-party custodian of information necessary in discovery.

MR. ROSSBACHER: That's what we served them as, your Honor. Both the Secret Service and the government, they stonewalled us. They wouldn't tell us who the agents were, including the agent who wore the mike. Now, they are coming in ——

THE COURT: All right.

On the theory that that is the position of the government, as custodian of information in the case against CBS, that list should be turned over, so the stay doesn't apply to that information, but, otherwise, all discovery is stayed.

MR. McGRAW: Your Honor, would that be the agents who engaged in the search of the plaintiffs' apartment?

THE COURT: That's what they wanted.

MR. ROSSBACHER: Yes, that was already turned over in *Bivens*, your Honor.

THE COURT: Okay. Thanks very much.

MS. SCHACHTER: Thank you, your Honor.

MR. McGRAW: Thank you, your Honor.

THE COURT: I wish I had time to write an opinion, but I do not at this point.

(The proceedings are concluded.)

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

TAWA AYENI AND KAYODE AYENI, A MINOR, BY TAWA AYENI, HIS MOTHER AND NATURAL GUARDIAN, Plaintiffs - Appellees, - against - CBS INC., A NEW YORK CORPORATION, MEADE R. JORGENSEN, JAMES MOTTOLA, SEVEN UNKNOWN SPECIAL AGENTS OF THE UNITED STATES SECRET SERVICE AND TWO UNKNOWN POSTAL INSPECTORS OF THE UNITED STATES POSTAL SERVICE, Defendants - Appellants.	Case No. CV-93-0957 (JBW) **ORDER**

All motions returnable to the Court on January 18, 1994 are hereby disposed of in accordance with the Court's ruling as stated on the record of the hearing on January 18, 1994.

SO ORDERED.

/s/ Jack B. Weinstein
HON. JACK B.WEINSTEIN
United States District Court
Eastern District of New York

Dated: Brooklyn, New York
February 8, 1994

(Entered Feb. 10, 1994).

APPENDIX D

Tawa AYENI and Kayode Ayeni, a minor, by Tawa Ayeni, his mother and natural guardian, Plaintiffs,

v.

CBS INC., a New York Corporation, Meade R. Jorgensen, James Mottola, Seven Unknown Special Agents of the United States Secret Service and Two Unknown Postal Inspectors of the United States Postal Service, Defendants.

No. CV 93-0957.

United States District Court,
E.D. New York.

April 7, 1994.

Rossbacher & Associates by Henry H. Rossbacher, Tracy W. Young, Nanci W. Nishimura, and Karen A. Widess, Los Angeles, CA, Harry C. Batchelder, New York City for plaintiff.

Douglas P. Jacobs, Madeleine Schachter, New York City, for defendants CBS Inc. and Meade R. Jorgensen.

Frank W. Hunger, Asst. Atty. Gen., Helene M. Goldberg, Director, Torts Branch, Stephen F. McGraw, Trial Atty., Torts Branch, Civ. Div., U.S. Dept. of Justice, Washington, DC, for defendant James Mottola.

AMENDED MEMORANDUM

WEINSTEIN, District Judge.

This case raises grave issues of the right to privacy in the home, free from the intruding eye and ear of a private broadcaster's television camera when: 1) access of the television crew was compelled by government officials without consent of the householder; 2) the officials had themselves obtained consentless entry, ostensibly by means of a search warrant; 3) the officials were not being aided in their search by the television crew; 4) the television crew was present only for proprietary reasons—i.e. potential profit to the television broadcaster; and 5) the television crew took from the home for the purpose of broadcasting them to the world at large, pictures of intimate secrets of the household, including sequences of a cowering mother and child resisting the videotaping.

The government and the broadcaster do not now contest the claim that serious psychic harm was suffered by the mother and child. Rather, they argue that this action against United States Treasury Agent, James Mottola, who allegedly arranged for the CBS crew's entry; CBS Inc., the broadcaster; and Meade R. Jorgensen, the CBS producer in charge of the crew, must be dismissed on the ground that they are immune from suit.

For the reasons indicated below this motion is denied. A prima facie gross violation of plaintiffs' clear constitutional rights has been pleaded against the government official. At the very least, plaintiffs are entitled to discovery in order to determine whether there was any justification for this intrusion of CBS into their home with the aid of a government official. The motion of CBS must be denied for this reason and, in addition, because a private broadcaster cannot cloak itself in

immunity of a government official under the facts of this case.

I. *Facts*

The complaint alleges:

On March 5, 1992, Agent Mottola obtained a search warrant based upon information provided by a confidential informant regarding Mr. Babatunde Ayeni's involvement in a credit card fraud operation. He is plaintiff Tawa Ayeni's husband and plaintiff Kayode Ayeni's father. The warrant authorized Agent Mottola and other government agents to enter the plaintiffs' apartment to search for:

> quantities of fraudulently obtained credit cards, lists of names and account numbers for such credit cards, credit card receipts, credit card applications, false identification documents, cash, correspondence, checkbooks, bank records, and U.S. Postal Service change of address form. [sic]

(Am. Compl. P. 24.)

Neither Mrs. Ayeni nor Kayode was under investigation for any illegal activity. At approximately 6:00 p.m. on March 5, 1992, six agents (four or five secret service agents and one or two postal inspectors) arrived at the Ayenis' three bedroom residence. Mrs. Ayeni and her son were home alone. The agents announced that they were police conducting an investigation and wanted to ask questions. When Mrs. Ayeni, clothed only in a dressing gown, cracked opened [sic] the door, the agents pushed into the apartment.

At approximately 8:15 p.m., Agent Mottola entered the apartment with three additional agents and a CBS news crew, including Meade R. Jorgensen, a camera operator, and a

sound technician. Jorgensen is employed by CBS News as a producer of "Street Stories," a weekly television news magazine. The crew was never identified as CBS employees. "Mrs. Ayeni believed that the CBS camera crew and defendant Jorgensen were part of the team executing the warrant." (Am. Compl. P. 29.)

Mrs. Ayeni objected to the presence of the camera. She asked why the men were videotaping. Kayode sat beside his mother on the couch crying. Mrs. Ayeni repeatedly requested that her picture not be taken and attempted to cover her face and that of the boy.

The CBS crew followed and taped the agents as they searched the apartment and the Ayenis' belongings. They took close-up pictures of the interiors of closets, personal letters, family pictures, and even of a homey maxim on the wall. (Am. Compl. P. 35 and videotape.) Throughout the search, Jorgensen questioned an agent wearing a microphone. In the foyer of the Ayeni apartment, the CBS crew interviewed this agent to determine the *modus operandi* of people who commit credit card frauds and the tools of their trade. During this sequence of the tape, the agent "implied the complicity of other residents of the Ayeni apartment." (Am. Compl. P. 37.)

While CBS taped her, the agents questioned Mrs. Ayeni regarding her husband's whereabouts and objects in the apartment. The only material seized from the apartment was a family photograph of the Ayenis, also taped by CBS.

After about 20 minutes the CBS crew left the premises with several agents. It videotaped one of the agents expressing disappointment that no evidence of credit card fraud had been found.

Plaintiffs contend that CBS and Jorgensen had an "agreement" with the Secret Service to enter the apartment. (Am. Compl. P. 30.) They assert that "defendants Jorgensen and CBS, individually and through their agents, servants and employees, were acting with the implied permission and consent of the United States Secret Service, Department of the Treasury and United States Postal Service." (Am. Compl. P. 22.) The complaint states:

> CBS also claims to have accompanied the Secret Service furthering the execution of the search in plaintiffs' apartment under the imprimatur of the official warrant and through the auspices of its "confidential informant," one of the Unknown Special Agents who participated in the search of the Ayeni apartment.

(Am. Compl. P. 31.)

II. *Law*

A. *Qualified Immunity of Agent Mottola.*

Government officials performing a discretionary function are immune from liability from civil damages unless their conduct violates "clearly established statutory or constitutional rights of which a reasonable person should have known," *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738, 73 L. Ed. 2d 396 (1982), or if it was objectively reasonable for the officials to believe that their acts did not violate those clearly established rights. *Finnegan v. Fountain*, 915 F.2d 817, 823 (2d Cir. 1990).

Inquiry into whether a right is clearly established cannot stop at a generalized level of fact. *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S. Ct. 3034, 3039, 97 L. Ed. 2d 523

(1987). An evaluation of the state of the law at the time of the official action in light of the particular factual circumstances of the case is required. *Id.* "The 'contours' of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right . . . . [I]n light of the preexisting law the unlawfulness must be apparent." *Id.*

To determine whether a right was clearly established at the time defendant Mottola acted, the court must consider:

> 1) whether the right in question was defined with "reasonable specificity"; 2) whether the decisional law of the Supreme Court and the applicable circuit court support the existence of the right in question; and 3) whether under preexisting law a reasonable defendant official would have understood that his or her acts were unlawful.

Soares v. Connecticut, 8 F.3d 917, 922 (2d Cir. 1993).

To determine whether an agent is immune from suit, the court must determine whether, at the time of the search, it was clearly established that his actions constituted an unreasonable search and seizure under the Fourth Amendment. The Fourth Amendment to the United States Constitution states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourth Amendment protects the right of private citizens to be free from unreasonable intrusions by government officials into areas where they have a reasonable expectation of privacy. *Katz v. United States*, 389 U.S. 347, 353, 88 S. Ct. 507, 512, 19 L. Ed. 2d 576 (1967). The home is the clearest example of such an area. The amendment has been interpreted broadly to place a number of restrictions on the government's ability to enter the home. *United States v. Sanusi*, 813 F.Supp. 149, 156-59 (E.D.N.Y. 1992). Protections of the Constitution not only guarantee that the government shall not intrude into the privacy of a home without good cause, *Steagald v. United States*, 451 U.S. 204, 212-16, 101 S. Ct. 1642, 1647-50, 68 L. Ed. 2d 38 (1981); *Payton v. New York*, 445 U.S. 573, 590, 100 S. Ct. 1371, 1382, 63 L. Ed. 2d 639 (1980), but it also ensures that when the government does enter that the interruption of privacy is minimized. *Marron v. United States*, 275 U.S. 192, 195, 48 S. Ct. 74, 75, 72 L.Ed. 231 (1927); *Dale v. Bartels*, 732 F.2d 278, 284-85 (2d Cir. 1984).

The search must be closely tailored to the purpose of the warrant. For example, it may not be unreasonably destructive of property. *See, e.g., United States v. Becker*, 929 F.2d 442, 446 (9th Cir.), *cert. denied* ___ U.S. ___, 112 S. Ct. 183, 116 L. Ed. 2d 145 (1991); *Tarpley v. Greene*, 684 F.2d 1, 9 (D.C. Cir. 1982). Agents may only search in areas that could reasonably contain the items specified in the warrant. *See, e.g., United States v. Ross*, 456 U.S. 798, 102 S. Ct. 2157, 72 L. Ed. 2d 572 (1982). Those searching may not remain on the premises for an unreasonable length of time after the search is complete. *See, e.g., United States v. Corrado*, 803 F.Supp. 1280, 1285 (M.D. Tenn. 1992). *See also* 2 Wayne R. LaFave, *Search and Seizure* § 4.10(d) (2d ed. 1987). Limitations on the scope of the intrusion are essential because of the great power wielded by government agents who enter a home with a warrant.

Where private citizens trespass and invade an individual's right to privacy, the individual has practical remedies such as locking the door or calling the police. If an intruder enters without permission intending to remove something without the right to do so, he commits a tortious trespass, *see* N.Y. Penal Law § 140.05, and criminal burglary. *See* N.Y. Penal Law § 140.20. By contrast, an official with a claim of a warrant authorized search cannot be resisted by the householder.

> [O]ne who demands admission under a claim of federal authority stands in a far different position. The mere invocation of federal power by a federal law enforcement officer will normally render futile any attempt to resist unlawful entry or arrest by resort to the local police; and a claim of authority to enter is likely to unlock the door as well.

Bivens v. Six Unknown Agents, 403 U.S. 388, 394, 91 S. Ct. 1999, 2003, 29 L. Ed. 2d 619 (1971) (citations omitted).

No case law has been cited specifically holding that an agent who allows a private citizen into a home to permit that person to photograph for non-governmental purposes during the execution of a search warrant is in violation of the Constitution. *Cf. Bills v. Aseltine*, 958 F.2d 697, 705 (6th Cir. 1992) (whether allowing a private person not assisting with search to photograph premises was an unreasonable search is a jury question); *Smith v. Fairman*, 98 F.R.D. 445 (C.D.Ill. 1982) (photographing by press of prisoner in cell without permission is a violation); *but cf. Fullman v. Graddick*, 739 F.2d 553, 560 (11th Cir. 1984) ("search of plaintiff's premises which was filmed and later published by the local media," but no indication that the official admitted the media and issue of photographing not discussed).

In a case such as the instant one involving fundamental constitutional principles, the law does not require that the court "point to precedent which is factually on all-fours with the case at bar." *Jefferson v. Ysleta Indep. Sch. Dist.*, 817 F.2d 303, 305 (5th Cir. 1987). Rather, "[i]t suffices that the [agent] be aware of general well-developed legal principles." *Id. See also Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443, 454 (5th Cir. 1994).

Section 3105 of Title 18 provides that a person not specifically authorized by a search warrant may not participate in a search unless he is aiding the officer authorized by the warrant. The provision reads as follows:

> A search warrant may in all cases be served by any of the officers mentioned in its direction or by an officer authorized by law to serve such warrant, *but by no other person, except in aid of the officer on his requiring it*, he being present and acting in its execution.

18 U.S.C. § 3105 (emphasis added). Section 3105 was enacted as a codification of the Fourth Amendment requirements for lawful searches and seizures. The wording was used in earlier statutes governing search warrants. *See* The National Prohibition Act, Title II, § 2, 41 Stat. 305, 308 (1919); Espionage Act, Title XI, § 7, 40 Stat. 217, 229 (1917).

The statute has been restrictively construed in light of its constitutional basis. *See, e.g., Bills v. Aseltine,* 958 F.2d at 706 (security guard not aiding in the search was not lawfully on premises); *United States v. Clouston*, 623 F.2d 485, 486-87 (6th Cir. 1980) (telephone company employee can assist in search); In re *Southeastern Equip. Co. Search Warrant*, 746 F.Supp. 1563, 1577 (S.D.Ga. 1990) (Customs Agent has the

right to ask Department of Defense investigator to assist in search); *United States v. Gambino*, 734 F.Supp. 1084, 1091 (S.D.N.Y. 1990) (confidential informant may assist in search); *United States v. Schwimmer*, 692 F.Supp. 119, 126-27 (E.D.N.Y. 1988) (computer expert may assist in search).

Congress—as well as the courts and the President—has the power and the responsibility to interpret the Constitution in legislating. *Cf.* Laurence H. Tribe, *American Constitutional Law*, § 5-1 (2d ed. 1988). Courts assume that statutes effectuating or executing constitutional mandates were adopted with this obligation in mind. Statutes as well as case law can thus be relied upon in determining whether a constitutional right is clearly established.

Taking photograph is a "seizure" within the meaning of the Fourth Amendment. *See United States v. Villegas,* 899 F.2d 1324 (2d Cir.), *cert denied,* 498 U.S. 991, 111 S. Ct. 535, 112 L. Ed. 2d 545 (1990) (taking photographs is a seizure of an intangible similar to tapping a telephone line in that they are both seizures of information). In some circumstances courts have held that seizures of information, though not specifically delineated in a warrant, are constitutional under the "plain view" doctrine. *See Bills v. Aseltine,* 958 F.2d at 707 (photographs of areas in "plain view" during search are within scope of warrant); *United States v. Espinoza*, 641 F.2d 153, 166 (4th Cir.) (same), *cert. denied*, 454 U.S. 841, 102 S. Ct. 153, 70 L. Ed. 2d 125 (1981) (same). The "plain view" doctrine requires that the person viewing the premises be there lawfully. *Bills v. Aseltine*, 958 F.2d at 707.

B. *Qualified Immunity of CBS and Jorgensen.*

Both CBS and Jorgensen claim qualified immunity. Their argument is that, if they were acting with the permission of

government agents, as alleged in the complaint, they should be entitled to the same qualified immunity enjoyed by government officials. The Supreme Court made it clear in *Wyatt v. Cole,* —— U.S. ——, 112 S. Ct. 1827, 118 L. Ed. 2d 504 (1992) that "qualified immunity . . . acts to safeguard the government, and thereby to protect the public at large, not to benefit its agents." *Id.* at ——, 112 S. Ct. at 1833.

III. *Application of Law To Facts*

The search warrant was issued to Agent Mottola and other agents of the United States Secret Service for precise and limited purposes. It authorized their entry into the Ayenis' home only to search for items related to credit card fraud. Agent Mottola's act of facilitating the CBS camera crew's entry into the apartment and its filming of the search exceeded the scope of the warrant. It was allegedly in clear violation of then well established Fourth Amendment principles. For purposes of the instant case, it is the equivalent of a rogue policeman using his official position to break into a home in order to steal objects for his own profit or that of another.

As a Secret Service Agent, Agent Mottola was authorized by law to execute search warrants. 18 U.S.C. § 3056(c)(1)(A). His power was limited by restrictions established by Congress and by the Constitution. The action of Agent Mottola — arguably at this stage in the proceeding — was so far from then well established acceptable constitutional behavior that no case law precedent was needed to alert him to the fact that the execution of a warrant for the benefit of private persons violated the Constitution.

The video pictures taken by the camera crew was a seizure under the meaning of the Fourth Amendment. The complaint does not allege that the CBS crew was aiding the agents in any way. It alleges that the news crew was filming

for their own news gathering purposes, not as part of the authorized search. If this is so, the camera crew was in the Ayeni home unlawfully, in contravention of section 3105 of Title 18 and the Constitution, and, therefore, the filming was a seizure beyond the scope of the warrant. It would be, arguably, grossly unreasonable for a government agent not to have known that the presence of private persons he invited in so that they could titillate and entertain others was beyond the scope of what was lawfully authorized by the warrant.

Based on the facts presently before the court, the defense of qualified immunity cannot be found to be available to shield Agent Mottola from liability. Discovery is required. A motion to dismiss or for summary judgment may be made when the facts are clearer.

CBS has no greater right than that of a thief to be in the home, to "capture" the scene of the search on film and to remove the photographic record. The images, though created by the camera, are a part of the household; they could not be removed without permission or official right.

CBS claims no First Amendment right to be present. The television tape was a seizure of private property, information, for non-governmental purposes.

CBS, as a private corporation, and Jorgensen, as a private individual, are not, on the pleadings, entitled to qualified immunity. Even were they entitled to the same defense as a government official, as already noted, the complaint alleges a violation of a then clearly established constitutional right — precluding a grant of qualified immunity to the official.

The plaintiffs also allege Fifth Amendment violations arising out of the same set of facts. Whether or not plaintiffs have a cause of action under the Fifth Amendment, *see*

Albright v. Oliver, ____ U.S. ____, 114 S. Ct. 807, 127 L. Ed. 2d 114 (1994), because the case must go forward into a discovery phase on the Fourth Amendment issue, Agent Mottola's claim of immunity from Fifth Amendment claims is also denied with leave to renew after further discovery.

IV. *Conclusion*

The motion to dismiss is denied. Discovery must be permitted under the control of the magistrate judge. Upon completion of discovery defendants may renew their motion to dismiss and the parties may move for summary judgment.

Supreme Court, U.S.
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MAR 20 1995
OFFICE OF THE CLERK

(2)

No. 94-1202

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

JAMES MOTTOLA,
PETITIONER,

vs.

TAWA AYENI AND KAYODE AYENI,
RESPONDENTS.

ON PETITION
FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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March 1995

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I.

QUESTION PRESENTED

Whether it was clearly established, and a reasonable law enforcement officer would have believed, that an officer was violating the Fourth Amendment to the Constitution when he permitted private individuals, under the imprimatur of a search warrant, to enter private property without the residents' consent and to conduct a search and effect seizures for purposes that were unrelated to any legitimate law enforcement activity.

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STATEMENT OF THE CASE

This case arises from an incident occurring on March 5, 1992 involving video and audiotaping by CBS television of the execution of a search warrant by Secret Service and other law enforcement agents in the private home of Babatunde Ayeni and his wife and then five year old son, Respondents Tawa and Kayode Ayeni. Respondents ("the Ayenis") were home in their apartment in Brooklyn, New York at the time of the search. They are suing Petitioner Secret Service Agent James Mottola ("Mottola") for civil damages resulting from his violation of their Fourth Amendment rights arising from his admitted entry into their home with the media in tow under the auspices of a search warrant.[1]

The facts alleged in the First Amended Complaint, accepted as true and found to be undisputed by the Second Circuit, establish the following series of events. On March 5, 1992, Mottola obtained a search warrant based upon information provided by a confidential informant that Babatunde Ayeni was engaged in credit card fraud. The warrant authorized Mottola and "any Authorized Officer of the United States" to enter the Ayenis' apartment to search for "fraudulently obtained credit cards" and other, documentary

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[1] At the time of the proceedings in the District Court, the unknown Secret Service agents and Postal Inspectors who participated with Mottola in the search had not yet been served with a complaint. The Government, pursuant to an order by the District Court, thereafter disclosed the names of the unknown agents. Filing of an Amended Complaint identifying the agents is being held in abeyance by the District Court pending this Court's determination of Mottola's Petition. Mottola was thus the sole defendant for purposes of the appeal to the Second Circuit Court of Appeals. Furnishing the agents names is the only discovery permitted to this point. The case is stayed pending resolution of the instant petition.

evidence of credit card fraud. (Am. Compl. P. 24.)[2] Neither Mrs. Ayeni nor Kayode was under investigation for any illegal activity.[3]

Prior to March 5, 1992, the Secret Service had effected an agreement with CBS, Inc. permitting the network to send its employee Meade Jorgenson ("Jorgenson") and a camera crew along on the search warrant execution at the Ayeni home. Jorgenson was a producer of a weekly CBS television news magazine called "Street Stories." This agreement and the plan to take a media news crew along on the search had been concealed from the Magistrate Judge who approved the search warrant. Mottola does not dispute that the CBS camera crew and Jorgenson were unnecessary to the execution of the search warrant.

At approximately 6:00 p.m. on March 5, 1992, six armed agents arrived without a warrant at the Ayeni apartment where Mrs. Ayeni and her son were home alone. The agents called through the Ayenis' closed door that they were "police" conducting an investigation and wanted to ask questions. When Mrs. Ayeni, clothed only in a dressing gown, cracked open the door, one agent pushed her in the chest to move her away from the door while two other agents pushed open the door. The agents then entered the apartment. As several of the agents rushed into the bedroom and started searching in the closets, Mrs. Ayeni asked to see a warrant. One of the agents told her they were waiting for other agents to bring the

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[2] "Am. Compl." refers to the First Amended Complaint.

[3] Federal agents Mirandized Mrs. Ayeni although she was not under suspicion or investigation or ever charged with any crime. (See Joint Appendix ("J.A.") filed in support of the appellate briefing before the Second Circuit, at pages 178-180, Affidavit of Tawa Ayeni.)

warrant. Mottola was not present with this first group of agents; he was obtaining the warrant and may have been communicating with them by radio.

At approximately 7:50 p.m., nearly two hours after the initial entry, the agents were notified by radio that the warrant had just been signed. It is possible they were notified by Mottola who was in charge of the search. The agents then commenced an aggressive search. At approximately 8:15 p.m., Mottola entered the apartment with three additional armed agents. He ushered in a CBS news crew, including Jorgensen, a camera operator, and a sound technician. Neither Jorgenson nor the crew were ever identified to Mrs. Ayeni, who believed they were part of the team of agents executing the warrant. No permission for their presence was ever given by the Ayenis.

Mrs. Ayeni immediately objected to the videotaping, trying to avoid it by covering her and Kayode's faces with a magazine. Kayode sat on the couch crying and told his mother he was frightened. When Mrs. Ayeni tried to shield her son's face, Mottola grabbed the magazine out of her hand, threw it on the floor, and told the Ayenis to "shut up." Mottola or one of the other armed agents directed the CBS crew to videotape Mrs. Ayeni, who repeatedly requested that their pictures not be taken.

While CBS video and audiotaped Mrs. Ayeni and her child, the agents questioned Mrs. Ayeni regarding her husband's whereabouts and how they had paid for several expensive wristwatches the agent had found in the apartment. The CBS crew followed and taped the agents as they searched the apartment and the Ayenis' belongings. They took close-up pictures of the interiors of closets, personal letters, personal financial records, family pictures, and even of a homey maxim

about marriage hanging on the wall. Throughout the search, Jorgensen, the CBS producer, interviewed an agent wearing a wireless microphone provided by the CBS crew. In the foyer of the Ayeni apartment, the CBS crew elicited from this agent his views on the modus operandi of people who commit credit card fraud and the tools of their trade. During the sequence of the tape, the agent "implied the complicity of other residents of the Ayeni apartment." (Am. Compl. P. 37.)

After about 20 minutes of taping, the CBS crew left the premises with Mottola and several agents. The crew videotaped one of the departing agents expressing disappointment that no evidence of credit card fraud had been found. The remaining agents did not complete the search until approximately 9:35 p.m., more than three and one-half hours after the initial entry and an hour after the camera crew left. The only material seized from the apartment was a family photograph of the Ayenis, also videotaped by CBS.

Mrs. Ayeni's husband, Babatunde, was subsequently indicted for credit card fraud. The District Court (the Honorable Jack B. Weinstein, presiding) denied CBS' Motion To Quash Mr. Ayeni's subpoena for the videotape of the search. United States v. Sanusi et al., (E.D.N.Y.1992). Mrs. Ayeni and Kayode thereafter instituted a Federal civil action for damages against Mottola, other Unknown Agents and Postal Inspectors, CBS Inc. and Meade R. Jorgensen, citing constitutional violations under this Court's decision in Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 404 n.5, 91 S.Ct. 1999, 2009 n.5, 29 L.Ed.2d 619 (1971). The Ayenis alleged also common law tort claims against the CBS defendants, as well as claims for

injunctive and declaratory relief.[4]

The CBS defendants admitted they had permission from the Secret Service and Department of Justice to videotape the execution of the search warrant in the Ayeni apartment. The Secret Service admitted giving permission, stating CBS had been "let along on a number of outings" with the agents "in the field." (App. Opp. Brf. p. 12-13 and referenced record citations.)[5] CBS entered with the agents under the warrant's authority. CBS received permission in the criminal case to obscure the identity of its "confidential informant on the version of the tape produced," one of the agents who participated in the search of the Ayeni apartment. This "confidential informant" was Mottola. (Ibid.) Neither Mottola nor CBS claims that CBS was assisting Mottola and the agents in execution of the warrant.

The Second Circuit Court of Appeals, in a published opinion, affirmed the District Court's denial of Mottola's motion to dismiss the complaint, rejecting as a matter of law his claim of qualified immunity from civil suit under the Bivens case for his involvement in the media's illegal entry into the Ayeni home and participation in the search under color of Federal authority. Ayeni v. Mottola, 35 F.3d 680 (2d Cir. 1994); Ayeni v. CBS, Inc., 848 F.Supp. 362 (E.D.N.Y. 1994). The issue of the presence of unauthorized persons during the search of the Ayeni home is only one of the issues addressed by the Second Circuit. The Second Circuit upheld

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[4]The Ayenis have since entered a confidential settlement with the CBS defendants, Jorgenson and CBS, Inc.

[5]"App. Opp. Brf" refers to Appellees' Opposing Brief filed in response to Mottola's Opening Brief on appeal to the Second Circuit Court of Appeals.

constitutional claims based on the extent of the agents' use of physical force, the intrusiveness and excessiveness of the search, and the agents' entry, detention and search prior to obtaining the warrant. The Court found that unresolved material issues of fact remained for the jury to decide with respect to these issues. 35 F.3d at 688-691. (App. p. 14a - 21a.)[6] The Second Circuit found also that the video and sound recordings made by CBS and the Government agents were "seizures" under the Fourth Amendment, and rendered the search excessively intrusive. 35 F.3d at 688. (App. p. 15a - 16a.) Mottola does not seek review as to these aspects of the Second Circuit's decision in this Court.

Mottola's Petition concerns only the Second Circuit's decision that he could not claim qualified immunity for his conduct in bringing CBS along on the search. The Second Circuit concluded that (1) "Mottola exceeded well-established principles when he brought into the Ayeni home persons who were neither authorized by the warrant to be there nor serving any legitimate law enforcement purpose by being there. A private home is not a soundstage for law enforcement theatricals...," and (2) "... an objectively reasonable officer could not have concluded that inviting a television crew or any third party not providing assistance to law enforcement -- to participate in a search was in accordance with Fourth Amendment requirements." 35 F.3d at 686. (App. p. 10a.)

REASONS FOR DENYING THE WRIT

Mottola claims his petition should be granted because the Second Circuit failed to apply correct standards in determining

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[6] "App." refers to the Appendix filed by Mottola in support of his Petition.

the existence of "clearly established" law, and its approach conflicts with the approach of other Circuits. Mottola is wrong. Contrary to Mottola's assertions, there are no conflicting, controlling appellate court decisions, either from the Second or other Circuits, which the Second Circuit should have, but failed to consider. The case law Mottola cites as the basis for his claim consists of two, unpublished District Court and one State Court decision from other jurisdictions which had no legal significance in the Second Circuit's analysis. Rather, the Second Circuit followed the controlling and important appellate decisions which fully support its decision.

Moreover, the conflict among the Circuits Mottola claims exists is based on his erroneous representation that the Second Circuit relies only on its own law and the law of this Court to determine whether a constitutional right has been "clearly established." The Second Circuit does not engage in such a practice and did not do so in this case, instead considering important and controlling decisions from this Court, the Second Circuit and other jurisdictions, which is the appropriate procedure.

For these reasons and the reasons stated below, Mottola's Petition should be denied.

ARGUMENT

THE SECOND CIRCUIT RELIED ON WELL-DEVELOPED PRINCIPLES OF CONSTITUTIONAL LAW IN FINDING IT "CLEARLY ESTABLISHED" THAT AN OFFICER'S USE OF A SEARCH WARRANT TO PERMIT UNAUTHORIZED INDIVIDUALS TO ENTER PRIVATE PROPERTY, SEARCH AND SEIZE FOR NO LAW ENFORCEMENT PURPOSE VIOLATES THE FOURTH AMENDMENT.

Mottola does not dispute that his conduct exposed him to prosecution for criminal trespass under New York State law and for violation of 18 U.S.C. § 3105, as well as common law causes of action such as trespass and conversion. Nor does Mottola challenge the Second Circuit's conclusion that his conduct was unconstitutional, only that when he brought CBS along on the search, the then existing law did not clearly establish that his conduct was unconstitutional. Mottola's argument is unfounded and does not merit Supreme Court review.

Government officials performing a discretionary function are immune from liability for civil damages unless their conduct violates "clearly established statutory or constitutional rights of which a reasonable person should have known." Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982). This Court, in Anderson v. Creighton, 483 U.S. 635, 640, 107 S.Ct. 3034, 3039, 97 L.Ed.2d 523 (1987), delineated the parameters controlling the inquiry into whether the claimed Constitutional right was "clearly established" at the time of the officer's alleged actions and whether a reasonable officer would have been aware of the right:

> "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that

> an official action is protected by qualified immunity unless the very action in question has previously been held unlawful...[Citation omitted]; but it is to say that in light of pre-existing law the unlawfulness must be apparent...[Citation omitted.]".

The Anderson Court recognized further that even where the right has been found to be "clearly established," the official may still be immune from suit if he can show he was objectively reasonable in mistakenly concluding that his acts were constitutional. Id.

The Anderson test permits finding a clearly established right even where an earlier decision is not directly on point with the current facts. See Mitchell v. Forsyth, 472 U.S. 511, 535 n.12., 105 S.Ct. 2806, 2820 n.12, 86 L.Ed.2d 411 (1985). In Mitchell this Court concluded,

> "We do not intend to suggest that an official is always immune from liability or suit for a warrantless search merely because the warrant requirement has never explicitly been held to apply to a search conducted in identical circumstances..."

In Shabazz v. Coughlin, 852 F.2d 697, 701 (2d Cir. 1988), the Second Circuit concluded that in the absence of a decision on point, the Court must look for the presence of cases "foreshadowing" a ruling on the issue. In Jefferson v. Ysleta Indep. Sch. Dist., 817 F.2d 303, 305 (5th Cir. 1987), the Fifth Circuit found that a court does not have to find "...precedent which is factually on all-fours with the case at bar....It suffices that the [agent] be aware of general well-developed legal principles." The approach taken by these circuits is entirely consident with the Anderson Court's admonition that raising "extremely abstract rights" to the level of "clearly established" rights would result in an officer's "virtually unqualified liability." Anderson v. Creighton, supra, 483 U.S. at 639, 107 S.Ct. at 3039.

At the outset, the issue before the Second Circuit was purely a question of law. See Elder v. Holloway, __U.S.__, 114 S.Ct., 1019, 1023, 127 L.Ed.2d 344 (1994). Mottola does not ask that any of the Court's findings be remanded for jury resolution, arguing only that the Court's legal rulings that his conduct violated clearly established law and that a reasonable officer would have been aware that his conduct was unconstitutional, were erroneously based on general or abstract principles. Because the Second Circuit's decision is correctly based on controlling time-hewn legal principles which for years have been the accepted guidelines for reviewing law enforcement officers' actions in the context of the Fourth Amendment, Mottola's Petition should be denied.

At the time the Second Circuit ruled, there were not yet any decisions specifically holding that an agent who allows the media into a private home to participate in execution of a search for non-governmental purposes violates the Constitution. Such "on all fours" precedent was not, however, required. Mottola's conduct was "...so far from then well established acceptable constitutional behavior that no case law precedent was needed to alert him to the fact that the execution of a warrant for the benefit of private persons violated the Constitution...." Ayeni v. CBS Inc., supra, 848 F.Supp. at 368.[7]

The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures...." Entering a private home without consent pursuant to a search warrant is a power "exclusively reserved to the State." Flagg Brothers, Inc. v. Brooks, 436 U.S. 149, 98 S.Ct. 1729, 56 L.Ed.2d 185 (1978). The touchstone for analyzing whether governmental action violates the Fourth Amendment is thus

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[7]District Judge Weinstein compared Mottola to a "rogue policeman" using his official position to steal from a private home. Id.

whether that action was "reasonable."

As the Second Circuit correctly noted, the reasonableness requirement applies both to the decision whether to conduct a search and to the manner and scope of the search and seizure that is carried out. 35 F.3d at 684. (App. p. 6a.) The controlling case law defining the general inquiry for determining reasonableness has made clear over the years that government officials' discretion in their execution of a search warrant is limited to either,

> (a) actions expressly authorized by the warrant...or (b) such further actions as are impliedly authorized because they are reasonably related to accomplishing the search authorized by the warrant or accomplishing legitimate law enforcement objectives...."

35 F.3d at 685. (App. p. 8a.)

In articulating these principles, the Second Circuit cited to and relied on the decisions of this Court, as well as its own decisions and those of the Ninth and D.C. Circuit Courts of Appeals. Id.; see Graham v. Connor, 490 U.S. 386, 395, 109 S.Ct. 1865, 1871, 104 L.Ed.2d 443 (1989); see also Tennessee v. Garner, 471 U.S. 1, 7-8, 105 S.Ct. 1694, 1699-1700, 85 L.Ed.2d 1 (1985); Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 394 n.7, 91 S.Ct. 1999, 2004 n.7, 29 L.Ed.2d 619 (1971); United States v. Matias, 836 F.2d 744, 747 (2d Cir. 1988); United States v. Crozier, 777 F.2d 1376, 1381 (9th Cir. 1985); United States v. Heldt, 688 F.2d 1238, 1260 (D.C. Cir. 1981), cert. denied, 456 U.S. 926, 102 S.Ct. 1971, 72 L.Ed.2d 440 (1982); Delaware v. Prouse, 440 U.S. 648, 654-655, 99 S.Ct. 1391, 1396, 59 L.Ed.2d 660 (1979). The law thus clearly held at the time of Mottola's performance that intrusions into a private dwelling by law enforcement agents must be authorized, either expressly by the warrant or impliedly in furtherance of a legitimate law enforcement

purpose. Mottola's actions here are not even claimed to have been authorized by the warrant or other circumstances.

These restrictions limiting an officer's discretion insofar as it concerns an officer's non-consensual entry into a private home are rooted in the privacy element of the Fourth Amendment. The Second Circuit, relying on this Court's decisions, explained that,

> 'The protection of privacy from encroachment by government officials is the "'principal object' of the [Fourth] Amendment.'....The home has properly been regarded as among the most highly protected zones of privacy....'

35 F.2d at 684-685, citing Soldal v. Cook County, __U.S.__, 113 S.Ct. 538, 545, 121 L.Ed.2d 450 (1992) [citing Warden, Maryland Penitentiary v. Hayden, 387 U.S. 294, 304, 87 S.Ct. 1642, 1648-49, 18 L.Ed.2d 782 (1967)]; Winston v. Lee, 470 U.S. 753, 758, 105. S.Ct. 1611, 1615, 84 L.Ed.2d 662 (1985); and additional citations; see also Griswold v. Connecticut, 381 U.S. 479, 484, 85 S.Ct. 1678, 1681-1682, 14 L.Ed.2d 510 (1965); Boyd v. United States, 116 U.S. 616, 630, 6 S.Ct. 524, 532, 29 L.Ed. 746 (1886). Under these clearly enunciated principles of Constitutional law, it is manifest that Mottola's unauthorized actions violated the Ayenis' constitutional right to be free from governmental intrusion into their private home and lives. A law enforcement officer would have been aware of these principles and it would have been apparent to the officer that unauthorized actions such as those undertaken by Mottola were constitutionally deficient.

Mottola does not contend (nor could he) that his actions were expressly authorized by the warrant. The warrant identified the premises to be searched, the items to be examined and seized and those who could conduct the search. In this instance the warrant authorized only Mottola and "...any Authorized Officer of the United States" to conduct a search

for evidence of credit card fraud. Ayeni v. Mottola, supra, 35 F.3d at 685. Nor does Mottola contend that his actions in bringing unauthorized private persons into the Ayeni home were impliedly authorized because they were in furtherance of any legitimate law enforcement purpose. It is not disputed that Mottola and the Secret Service brought the CBS crew and Jorgenson along on the search in order to help them obtain video and audiotaped material for the TV newsmagazine "Street Stories." Accordingly, it was clear under the controlling legal principles discussed above, and Mottola should have known, that his conduct was unconstitutional.

The analysis need not, although it could, stop here. At the time Mottola took CBS along on the search, there also existed factually comparable controlling Federal appellate case law applying these principles and statutes which further establish that his actions were unconstitutional. Cases interpreting the legal principles discussed ante have found that the authority of law enforcement officials to enter private property, created expressly or impliedly by warrant or statute, does not include their bringing unauthorized individuals along to participate in or conduct a search and effect seizures. Such an illegal entry and search violates the Fourth Amendment. See United States v. Sanchez, 509 F.2d 886 (6th Cir. 1975); see also United States v. Hare, (6th Cir. 1979); United States v. Warren, 550 F.2d 219 (5th Cir.), cert. denied, 434 U.S. 1016, 98 S.Ct. 735, 54 L.Ed.2d 762 (1978).

In Sanchez, state officers with a warrant to search for narcotics learned there might also be explosives present on the property to be searched. They asked an agent from the Bureau of Alcohol, Tobacco and Firearms ("ATF") to assist in searching for the explosives. The ATF agent, although he had the time, did not obtain a separate, Federal warrant to search for explosives. The agents found explosives, but no narcotics. The Sixth Circuit suppressed the explosives, finding that the Federal agent's unauthorized presence on the property was unconstitutional. 509 F.2d at 889. The basis for the Court's

decision was that the ATF agent did not have "...aright to be on the premises." Id. at 890.[8] In Warren, the Fifth Circuit suppressed evidence of narcotics where DEA agents, suspicious of narcotics smuggling, boarded a vessel with the Coast Guard without a search warrant claiming justification under the latter's authority to make safety inspections. The Court found the search and seizure by the DEA unconstitutional because, (1) the Coast Guard was not authorized to delegate its authority to inspect to other branches of the government, and (2) the DEA agents had no authority to board the ship. 550 F.2d at 225.[9]

That Mottola's actions violated the Fourth Amendment is also supported by statutory requirements. 18 U.S.C. § 3105 (1988) provides,

> "A search warrant may in all cases be served by any of the officers mentioned in its direction or by an officer authorized by law to serve such warrant, but by no other person, except in aid of the officer on his requiring it, he being present and acting in its

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[8]The Sanchez Court's decision has been criticized by other courts insofar as it is based on the Court's finding that the ATF agent had time to obtain a warrant yet failed to do so prior to entering the property. See, e.g., United States v. Johnson, 707 F.2d 317, 320-323 (8th Cir. 1983). The cases criticizing Sanchez do not disagree with the Court's finding that such actions are unconstitutional, only with the reasoning supporting the Court's conclusion that the ATF agent had not been authorized to enter and search.

[9]In Bills v. Aseltine, 958 F.2d 697 (6th Cir. 1992), decided after the Ayeni search, officers executing the warrant invited a private security guard to conduct an inspection of the private dwelling they controlled subject to the search. In Bills, the Court concluded that issues "concerning the manner in which the search warrant was executed turned on factual questions that should have been submitted to the jury". Id. at 705. The Court did, however, support the proposition that permitting the presence of a third party not assisting in the search violates the Constitution and based that rationale in part on the prior Sanchez decision.

execution."

Although the statute uses the word "serve" and not "execute," it has been construed to apply to both actions. See United States v. Wright, 667 F.2d 793, 797 (9th Cir. 1982); United States v. Clouston, 623 F.2d 485, 486 (6th Cir. 1980); United States v. Gervato, 474 F.2d 40, 45 (3d Cir.), cert. denied, 414 U.S. 864, 94 S.Ct. 39, 38 L.Ed.2d 84 (1973). The Second Circuit found Mottola "clearly violated Section 3105." 35 F.3d at 687.

The Second Circuit correctly relied on 18 U.S.C. § 3105 as providing "some basis for giving content to the [Fourth] Amendment's generalized standard of reasonableness...," likening the provision to 18 U.S.C. § 3109 (the "knock and announce statute"), the requirements of which a majority of circuits have concluded "coincide with the reasonableness requirements of the Fourth Amendment." 35 F.3d at 687 and n.9 (App. p. 11a - 13a.) The cases surveyed by the Second Circuit construing Section 3105 establish that "the presence of a third party who is assisting authorized officers in their search does not violate the Fourth Amendment's reasonableness requirement...[[10]]." 35 F.3d at 687. (Emphasis included). For example, in United States v. Clouston, 623 F.2nd 485, 486-487 (9th Cir. 1980), the Sixth Circuit found that the presence of telephone company employees at a search in a private residence was constitutional because the employees were assisting the officers and thus authorized under 18 U.S.C. § 3105 to be present and act in execution of the warrant. Id. at 1091. These decisions accept and enforce the statute's clear prohibition: no person other than authorized agents and properly designated private parties necessary for the warrant's

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[10] See United States v. Clouston, 623 F.2d [485] at 486-87...[6th Cir. 1980]; United States v. Gambino, 734 F.Supp. 1084, 1091 (S.D.N.Y. 1990)...; cf. In re Southeastern Equipment Co. Search Warrant, 746 F.Supp. 1563, 1577 (S.D. Ga. 1990)...; United States v. Schwimmer, 692 F.Supp. 119, 126-27 (E.D.N.Y. 1988)....

execution may be present. They and Section 3105 clearly notified Mottola of the wrongfulness of his conduct.

Federal Rule of Criminal Procedure 41, enacted in 1948, provides an additional basis for interpreting the Fourth Amendment's reasonableness requirement as excluding the actions undertaken by Mottola. Rule 41, which regulates the issuance of search warrants, has been interpreted by the courts for the proposition that no unauthorized persons may assist in executing the warrant except in situations of exigency or necessity. See, e.g., New York Telephone Co. v. United States, 434 U.S. 159, 98 S.Ct. 364 (1971).[11]

Conversely, the presence of a third party not assisting authorized officers would violate the Fourth Amendment. This conclusion is fully in accord with the test for determining whether law has been "clearly established" enunciated by Anderson and Harlow. The Seventh Circuit, interpreting this test, concluded in Donovan v. City of Milwaukee, 17 F.3d 944, 952 (7th Cir. 1994),

> "In the absence of controlling authority on point, 'we seek to determine whether there was such a clear trend in the case law that we can say with fair assurance that the recognition of the right by a controlling precedent was merely a question of time.'"

Under the controlling authorities discussed above, it was inevitable that when faced with a fact pattern such as that presented by Mottola's conduct, a Court whose decisions are broadly controlling would recognize that such conduct violates the Fourth Amendment. Indeed, the fact that the

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[11]Federal Rule of Criminal Procedure 41(c) directs that a search warrant be directed "to a civil officer of the United States authorized to enforce or assist in enforcing any law thereof...[and] shall command the officer to search...."

unauthorized private parties brought by the officer along on the search are members of the media who video and audiotaped the Ayenis, illegally seizing their statements and images of them, their home and their personal effects, renders the finding of constitutional violation even more compelling. The Second Circuit made the following poignant observation:

> "The unreasonableness of Mottola's conduct in Fourth Amendment terms is heightened by the fact that, not only was it wholly lacking in justification based on the legitimate needs of law enforcement, but it was calculated to inflict injury on the very value that the Fourth Amendment seeks to protect -- the right to privacy. The purpose of bringing the CBS camera crew into the Ayenis' home was to permit public broadcast of their private premises and thus to magnify needlessly the impairment of their right to privacy."

35 F.3d at 686.

Mottola simply ignores the mountain of authorities clearly establishing the right claimed by the Ayenis. In order to establish his claim that the right had not been clearly established and that he could not have reasonably been aware his actions violated the Constitution, Mottola relies on unsubstantiated factual assertions and the existence of irrelevant, non-binding precedent. Mottola cites to articles and publications to substantiate his otherwise unsupported factual assertion that 'conventional news programs and less traditional reality-based "cop shows" filmed all types of police action, including the execution of search warrants in private residences.' (Pet. p. 8-9.) These articles and publications are not, however, part of the record and should not be considered by this Court. See New Haven Inclusion Cases, 399 U.S. 392, 450 n.66, 90 S.Ct. 2054, 2088 n.66, 26 L.Ed.2d 691 (1970). Nor is there anything else in the record to support Mottola's factual assertion.

Moreover, that Mottola's actions may have been "common place" is irrelevant to establish whether a reasonable law enforcement officer would have known he was breaking the law, when the unlawfulness of the officer's actions is obvious under the clearly established law. Indeed, Mottola does not dispute that in undertaking such actions, other officers were committing State and Federal crimes and exposing themselves to civil suits for numerous common law causes of action. At least one State court decision in New York, the very jurisdiction where Mottola was operating, had held that such trespassory conduct violates the Constitution. A New York Court, in a published 1981 opinion deciding that the officers in question had committed trespass by authorizing the media to enter private property under a search warrant, noted:

> "If the news media were to succeed in compelling an uninvited and non-permitted entry into one's private home whenever it chose to do so, this would be nothing less than a general warrant, equivalent to the writs of assistance which were so odious to the American colonists. William Pitt, later Lord Chatham, found this unchecked intrusion so offensive to a free people that he denounced it in words which again bear repetition:
>
> > 'The poorest man may in his cottage bid defiance to all the forces of the crown. It may be frail--its roof may shake--the wind may blow through it--the storm may enter--the rain may enter--but the King of England cannot enter!'"

Anderson v. WROC-TV, 109 Misc. 2d 904, 441 N.Y.S.2d 220, 226, 7 Media L.Rep 1987 (Sup.Ct. Monroe Co. 1981).

The real thrust of Mottola's argument, however, lies in his reliance on irrelevant, distinguishable case law from other

jurisdictions which has no precedential or controlling value in the Federal court system. Higbee v. Times-Advocate, 5 Med.L.Rptr. 2372 (S.D. Ca. 1980) (unpublished); Moncrief v. Hanton, 10 Med.L.Rptr. 1620 (N.D. Oh. 1984) (unpublished); Prahl v. Brosamle, 98 Wis.2d 130, 295 N.W.2d 768 (Wis.App. 1980). Mottola asserts that these decisions should be followed because the facts in them are closely analogous to the facts of this case. He further asserts that the courts in these cases held that "the presence of news media at the execution of a search warrant does not violate the Fourth Amendment." (Pet. p. 5.)

Mottola then draws the conclusion that the decisions of the Supreme Court and the lower Federal Circuit Courts, including those discussed ante, are too "general" to "clearly establish" the law because the facts in those cases are not as "on point" as the facts in the less controlling decisions he cites. Mottola then parlays this reasoning into the position that his Petition should be granted so this Court can make the following determination: Whether courts, in determining "clearly established" law, must ignore controlling decisions and follow decisions by courts of inferior jurisdiction, whether unpublished, distinguishable or contrary to controlling constitutional principles, if the facts of the latter decisions are more closely analogous to the case being decided. Mottola's argument is unsupported by the case law and logically flawed.

In presenting his claim, Mottola mistakenly assumes that the words "clearly establish" require court decisions that are "on all fours" with the case being decided. As discussed above, the Supreme Court cases and controlling lower court decisions interpreting these words have no such requirement. See Anderson v. Creighton, 483 U.S. 635, 640, 107 S.Ct. 3034, 3039, 97 L.Ed.2d 523 (1987) (the "very action in question...[need not have] previously been held unlawful,....[I]n light of preexisting law the unlawfulness must be apparent...."); see also Shabazz v. Coughlin, 852 F.2d 697, 701 (2d Cir. 1988); Jefferson v. Ysleta Indep. Sch. Dist., 817 F.2d 303, 305 (5th Cir. 1987); Boswell v. Sherburne County, 849 F.2d. 1117, 1121 (8th Cir.),

cert. denied, 488 U.S. 1010, 109 S.Ct. 796, 102 L.Ed.2d 787 (1989); Donovan v. City of Milwaukee, 17 F.3d 944, 952 (7th Cir. 1994). The controlling law set forth above establishes that at the time Mottola threw open the Ayenis' home and private lives to the media under the pretext of a search warrant, the Fourth Amendment prohibited him from enlisting unauthorized individuals to participate in execution of a search warrant in a private home for no legitimate official purpose. The existence of controlling case law identifying such unauthorized individuals as members of the media would not have made the constitutional violation any clearer. Thus, Mottola's assertion that the law followed by the Second Circuit was unduly "general" is misplaced.

Mottola is also incorrect in asserting that the case law he cites should have been considered by the Second Circuit in its analysis, or that its consideration would have obscured the clearly established constitutional principles on which the Court relied. Initially, although the Second Circuit does not cite to the cases relied on by Mottola, this does not mean it failed to consider them. Regardless of the role they played in the Court's analysis, the Court was right not to rely on them. Higbee v. Times-Advocate, 5 Med.L.Rptr. 2372 (S.D. Ca. 1980) and Moncrief v. Hanton, 10 Med.L.Rptr. 1620 (N.D. Oh. 1984) are unpublished trial court opinions with no precedential value. The decision not to publish these decisions manifests an intention by those courts not to establish the law. Rather, these decisions indicate merely the resolution of a contested litigation and affect only those litigants. It would, in fact, be unreasonable for any Federal Court to purport to rely upon opinions the authors of which have determined will not be made available for use as precedent or, in fact, be known at all absent accidental discovery.[12]

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[12]It is compelling to note that the Sixth and Ninth Circuit Rules preclude or disfavor citation of unpublished opinions of those Circuits except for establishing "res judicata, estoppel, or the law of the case." Sixth Circuit

Even if these decisions were published, their precedential value would be generally limited to subsequent decisions by their respective courts. A District Court decision "will not ordinarily '"clearly establish" the law even of its own circuit, much less that of other circuits.'" Woodward v. City of Worland, 977 F.2d 1392, 1397 (10th Cir.), cert. denied, __U.S.__, 113 S.Ct. 3038, 125 L.Ed.2d 724 (1993), citing to Martin A. Schwartz & John E. Kirklin, Section 1983 Litigation: Claims, Defenses, and Fees § 9.20, at 537 (2d ed. 1991). A District Court decision is not binding precedent for decisions of other District Courts. Rather, a District Court is bound by decisions of the Court of Appeals of the Federal Circuit where it sits. See Fox v. Arcadia State Bank, 937 F.2d 1566, 1570 (11th Cir. 1991).

Indeed, even if the unpublished decisions cited by Mottola were controlling authority in their jurisdictions, which they are not, a reasonable officer in New York would not have been aware of them; officers are reasonably expected to be aware of controlling law that is either national in scope or more local, thus more directly controlling of the officer's actions. It is the existence of these cases which Mottola claims rendered the law less than "clearly established" at the time he invaded the Ayenis' home with CBS. Thus, Mottola cannot satisfy either aspect of the first prong of the Anderson test, i.e., lack of clearly established law of which a reasonable officer would have been aware.

These cases were also decided erroneously under the then existing clearly established principles of Constitutional law. The Court in Moncrief found there was no violation of the plaintiffs' "right to privacy under the Fourth Amendment by allowing the media to enter their premises along with the police" because it erroneously concluded that a constitutional violation required violation of the privacy right underlying non-

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Rule 24(c); See Ninth Circuit Rule 36-3.

Fourth Amendment case law, e.g., Roe v. Wade, 410 U.S. 113, 93 S.Ct. 715, 35 L.Ed.2d 147 (1973). The Court related the privacy right claimed by the Moncrief plaintiffs to a "general right of privacy" unrecognized by the Constitution. The Higbee decision also turned erroneously on an unduly restrictive characterization of the privacy right violated by the intrusion of the media under color of a Federal search warrant. These decisions were clearly erroneous under this Court's decisions cited ante which confirm that a right of privacy is firmly rooted in the Fourth Amendment. Decisions of this Court holding as such which were rendered after Moncrief and Higbee supersede those decisions, further destroying any relevance they may have had. See, e.g., Winston v. Lee, supra, 470 U.S. at 758, 105 S.Ct. at 1615; Soldal v. Cook County, supra, 113 S.Ct. at 545.

Mottola's reliance on the State case of Prahl v. Brosamle, 98 Wis.2d 130, 295 N.W.2d 768 (Wis.App. 1980) is also improper. In Prahl a Wisconsin appellate court found it was not unreasonable for a newscaster to film, then televise, the search of a shooting suspect's residence located in the same building as offices and a laboratory. There was no previous agreement between the government and the media to allow participation by the media in the search, and the police did not invite or directly participate in the filming. Even if Prahl were applicable factually to this case, which it is not, it would not be controlling on the issue of whether a Federal Constitutional right had been clearly established at the time of the challenged actions. Cf. Oregon v. Hass, 420 U.S. 714, 719, 95 S.Ct. 1215, 1219, 43 L.Ed.2d 570 (1975)(State cannot, as a matter of Federal Constitutional law, impose restrictions on law enforcement greater than those rejected by Supreme Court.)

Nor does Mottola's apparent need for precise factual identity work any better in relation to the second prong of the test for qualified immunity -- the requirement that the officer have been reasonably aware that his actions were unconstitutional. This case is not like cases where

determination of the appropriateness of an officer's challenged acts depends upon the set of specific circumstances surrounding them, e.g., the use of force in effecting an arrest. For example, it would not necessarily be clear that shooting a suspect during an arrest always constitutes excessive force. Under those circumstances the inquiry must focus on the circumstances surrounding the arrest and whether the officer was reasonably aware that his conduct under those circumstances was unconstitutional.

Here, Mottola's conduct fell within an entire category of behavior which the law has clearly established to be unconstitutional -- using his authority under a search warrant to permit unauthorized, private individuals to enter a private residence and participate in the search for no legitimate law enforcement purpose related to execution of the warrant. Under the controlling law, there are no circumstances under which this behavior could be deemed constitutional. Mottola's interpretation of the words "clearly established" would render most law enforcement officials unaccountable for obviously unconstitutional conduct unless that precise conduct had been found unconstitutional. Such a result demeans the integrity of the law enforcement process by giving a "green light" to plainly unconstitutional conduct which has not yet been brought to the attention of the court.

Mottola has thus failed to establish that the Second Circuit decided an "important question of Federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court." Supreme Court Rule 10.1(c). His Petition should be denied.

THIS CASE DOES NOT PRESENT FOR REVIEW APPLICATION OF A LEGAL PRINCIPLE THAT IS SUBJECT TO A CONFLICT IN THE CIRCUIT COURTS OF APPEAL.

Mottola claims as a further ground for review by this Court the existence of a conflict in the Circuit Courts of Appeal "on the proper sources of legal authority to be used in ascertaining whether a particular right has been clearly established for purposes of overcoming a qualified immunity defense." (Pet. p. 13.) Mottola premises this claim of conflict on the erroneous assertion that the Second Circuit looks only to its own and Supreme Court precedent to determine whether a constitutional right has been "clearly established," which Mottola claims conflicts with the practice of other Circuits. (Pet. p. 13.) The Second Circuit does not, as Mottola asserts, engage in such a limited practice in determining the existence of "clearly established" law. Accordingly, Mottola's petition should be denied.

Initially, assuming such a conflict exists, which it does not, this Court's decision in Elder v. Holloway, __U.S.__ 114 S.Ct. 1019, 127 L.Ed.2d 344 (1994) would have arguably resolved it. The Elder Court explained that,

> 'A court engaging in review of a qualified immunity judgment should therefore use its "full knowledge of its own [and other relevant] precedents." Davis, 468 U.S., at 192, n. 9.' (Emphases added.)

In any event, as discussed above, the Second Circuit does not limit itself to review of its own and Supreme Court precedent to determine whether a constitutional right has been "clearly established." It did not do so in this case and its prior decisions do not create such a restrictive approach. Thus, Mottola can not establish that the Second Circuit's characterization as to what constitutes appropriate sources of

law for determining the existence of "clearly established" constitutional law was in conflict with the decisions he cites. Indeed, the Second Circuit's approach was in accordance with the approach taken by the Circuits identified by Mottola and does not directly conflict with any of the cited approaches. Moreover, consideration of decisions from jurisdictions other than the Second Circuit and the Supreme Court, the approach Mottola claims conflicted with the Second Circuit's, would not change the result in this case.

In Soares v. State of Conn., 8 F.3d 917 (2d Cir. 1993), the Second Circuit looked to its own and Supreme Court precedent, as well as decisions from other circuits to see if the claimed right had been recognized and if the government official would have reasonably understood his actions violated the right in question. In Shabazz v. Coughlin, 852 F.2d 697, 701 (2d Cir. 1988) the Court found that a court must look for the presence of cases "foreshadowing" a ruling on the issue, or cases in other circuits taking a certain stand. In Weaver v. Brenner, 40 F.3d 527 (2d Cir. 1994), the Court reviewed decisions from the Ninth, Fourth and Seventh Circuits in determining the scope of a defendant's rights under Miranda.

In this case, the Court reviewed decisions from the Seventh, Ninth, Sixth and D.C. Circuit Courts of Appeal in discussing the "clearly established" principles of Constitutional law which compelled denial of Mottola's claim. 35 F.3d at 685-686 n. 4, 5, 6 & 8. The Court further reviewed decisions from the Third, Fourth, Fifth, Sixth, Seventh and Tenth Circuit Courts of Appeal and the Southern District of Georgia in determining that "the prohibitions of...[18U.S.C.]section 3105 may be considered in determining "reasonableness" under the Fourth Amendment...." 35 F.3d at 687 and n.9. (App. p. 7a - 13a.)

A brief review of the approaches undertaken by other Circuit Courts of Appeal in the decisions cited by Mottola establishes that the conflict he claims mandates this Court's

review does not in fact exist. Mottola claims the Tenth Circuit's approach is limited to its own and Supreme Court precedent, citing Woodward v. City of Worland, 977 F.2d 1392 (10th Cir.), cert. denied, __U.S.__, 113 S.Ct. 3038, 125 L.Ed.2d 724 (1993). The Woodward Court found, however,

> 'We recently held that "[o]rdinarily, in order for the law to be clearly established, there must be a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains." [Citation omitted.]'

Other jurisdictions follow a nearly identical approach. In Borucki v. Ryan, 827 F.2d 836 (1st Cir. 1987), the First Circuit, without articulating a test, refers to cases from other jurisdictions insofar as they discuss the right of privacy articulated in cases decided by this Court. In Giuffre v. Bissell, 31 F.3d 1241 (3d Cir. 1994), the Third Circuit does not articulate a test, but surveys Circuit Court decisions regarding a criminal defendant's Fifth Amendment right against self-incrimination under this Court's Miranda decision, without referring to any existing, relevant Third Circuit decision. On another issue related to the right to counsel, the Court cites only to precedents from this Court and its own decisions.

In Doe v. State of Louisiana, 2 F.3d 1412, 1416 (5th Cir.), cert denied, __U.S.__, 114 S.Ct. 1189, 127 L.Ed.2d 539 (1994), the Fifth Circuit articulates the following test:

> "[fn]8. In examining preexisting law,
>
> [a]s a general proposition, we will not rigidly define the applicable body of law in determining whether relevant legal rules were clearly established at the time of the conduct at issue. See Harlow v. Fitzgerald [457 U.S. 800 at 818, n. 32] 102 S.Ct. [2727] at 2738, n. 32 [73 L.Ed.2d 396]. Relying solely on Fifth Circuit and Supreme Court cases, for

> example, would be excessively formalistic, but they will loom largest in our inquiries. In determining what the relevant law is, then, a court must necessarily exercise some discretion in determining the relevance of particular law under the facts and circumstances of each case, looking at such factors as the overall weight of authority, and the status of the courts that render substantively relevant decisions, as well as the jurisdiction of the courts that render substantively relevant decisions...[citation omitted]."

In Boswell v. County of Sherburne, 849 F.2d. 1117, 1121 (8th Cir.), cert denied, 488 U.S. 1010, 109 S.Ct. 796, 102 L.Ed.2d 787 (1989), the Eighth Circuit canvasses other Circuit Courts' decisions to address what it considers an "open question," that is whether pre-trial detainees are afforded broader rights to emergency care under the Fourteenth Amendment than convicted criminals. The Court decided it did not need to answer the precise question, in part because this Court had not yet answered the question and the Circuit Courts had provided various responses.

In Donovan v. City of Milwaukee, supra, 17 F.3d at 952, the Seventh Circuit articulates the following test:

> 'In ascertaining whether a particular right has been "clearly established" within the meaning of Harlow, this court has not required binding precedent from the Supreme Court or the Seventh Circuit. Cleveland-Perdue, 881 F.2d at 431. In the absence of controlling authority on point, "we seek to determine whether there was such a clear trend in the case law that we can say with fair assurance that the recognition of the right by a controlling precedent was merely a question of time." Id.'

In Kirkpatrick v. City of Los Angeles, 803 F.2d 485, 490 (9th Cir. 1986), the Ninth Circuit articulates the following test:

> "We start by examining precedent from this court and the Supreme Court to determine if the right was clearly established at the time of Gates' and Aggas' actions. In the absence of binding precedent from this court or the Supreme Court, we look to decisions from other courts to determine if the right was clearly established...[citation omitted]. If we are required to examine decisions from other courts, the likelihood that this court or the Supreme Court would adopt the analysis of the other courts is also part of our inquiry...."

In Hunter v. District of Columbia, 943 F.2d 69, 78 (D.C.Cir. 1991), the D.C. Circuit Court of Appeals does not articulate a test, but canvasses decisions from other courts addressing the scope of the right to be free from excessive non-deadly force by a law enforcement officer. Finally, although not cited in Mottola's Petition, the Sixth Circuit, in the case of Ohio Civil Service Employees Ass'n v. Seiter, 858 F.2d 1171 (6th Cir.), concluded that to find "clearly established law," a court should undertake the following approach: It should first look to binding precedent of the Supreme Court, its own Circuit or itself, then it should look to law from other jurisdictions if that law is clear and foreshadowed by directly applicable authority. The Court noted,

> "Here a mere handful of decisions of other circuit and district courts, which are admittedly novel, cannot form the basis for a clearly established constitutional right in this circuit...."

Id. at 1177-1178.

Although the Eleventh Circuit in Belcher v. City of Foley, 30 F.3d 1390, 1400 (11th Cir. 1994) refused to look at decisions of the Fifth and Ninth Circuits, explaining that, '"we do not mean to imply that the law [of this Circuit] can be clearly established for qualified immunity purposes by non-binding precedent."...[citations omitted]', the Court went on to

distinguish the two other circuit cases; it concluded that even if the other decisions had been of the Eleventh Circuit, they would not have clearly established the law regarding the defendants' conduct in that case. Thus, the language indicating a narrow approach is dicta. This approach further does not conflict intolerably with a review of non-binding precedent from other jurisdictions which would foreshadow a subsequent result in the Eleventh Circuit. The following principle, relied on by this Court to dismiss a writ of certiorari as "improvidently granted" in Layne & Bowler Corp. v. Western Well Works Inc., 261 U.S. 387, 393, 43 S.Ct. 422, 423, 67 L.Ed. 712 (1923), is equally compelling in this case:

> "[I]t is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeal...."

Accordingly, Mottola has failed to establish the existence of an important question of Federal law requiring this Court's intervention, or an intolerable conflict of law among the Circuit Court of Appeals. See Supreme Court Rule 10.1(a) and (c).

CONCLUSION

For the reasons stated above, Mottola's Petition For Writ of Certiorari should be denied.

Respectfully Submitted,

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No. 94-1202

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

JAMES MOTTOLA,
Petitioner,

v.

TAWA AYENI AND KAYODE AYENI,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY MEMORANDUM

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March 1995

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No. 94-1202

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

JAMES MOTTOLA,

Petitioner,

v.

TAWA AYENI AND KAYODE AYENI,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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1. Respondents' opposition spends much time reiterating an undisputed proposition: that "[t]he *Anderson [v. Creighton,* 483 U.S. 635 (1987),] test permits finding a clearly established right even where an earlier decision is not directly on point with the current facts." Br. Opp. 9. That, however, simply begs the question presented by petitioner: whether a court is free to find a clearly established right -- a right whose contours are "sufficiently clear that a reasonable officer would understand that what he is doing violates that right," *Anderson,* 483 U.S. at 640 -- within its jurisdiction based on abstract legal principles when cases directly on point in other jurisdictions suggest that what he is doing violates no right at all. The answer is no.

Respondents argue that the Second Circuit could ignore foreign cases directly on point and find a clearly established right because petitioner's conduct was "so far from then well established acceptable constitutional behavior," *Ayeni v. CBS Inc.*, Pet. 64a, that no cases were needed to guide him. Br. Opp. 10. This argument misses the point: there *were* cases to guide Special Agent Mottola -- *Higbee v. Times-Advocate*, 5 Media L. Rptr. 2372 (S.D. Cal. 1980); *Moncrief v. Hanton*, 10 Media L. Rptr. 1620 (N.D. Ohio 1984); and *Prahl v. Brosamle*, 295 N.W.2d 768 (Wis. Ct. App. 1980) -- and these cases held that permitting news media to witness the execution of a warrant did not violate the United States Constitution. Respondents' contention is also substantially undermined by the pervasiveness of reality-based "cop shows" carried by the major television networks at the time of the challenged conduct.[1/]

When all is said and done, respondents press two real

[1/]Respondents are wrong that this Court cannot take judicial notice of the existence and airing of reality-based "cop shows" such as "Cops," "Top Cops," "Street Stories," "Night Beat," "American Detective," or "America's Most Wanted." Unlike the contested facts allegedly found in competing newspaper articles cited to the Court in the *New Haven Inclusion Cases*, 399 U.S. 392, 450 n.66 (1970), this information can be judicially noticed because it is both "generally known within the territorial jurisdiction of [this Court]," Fed. R. Evid. 201(b)(1), and "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)(2). *Ollman v. Evans*, 750 F.2d 970, 986 n.32 (D.C. Cir. 1984) (taking judicial notice that syndicated columns on political and social issues appear on the Op-Ed pages of newspapers), *cert. denied*, 471 U.S. 1127 (1985); *Microsoft Corp. v. BEC Computer Co.*, 818 F. Supp. 1313, 1319 (C.D. Cal. 1992) (taking judicial notice that a particular magazine article and advertisement exist); *Inc. Pub. Corp. v. Manhattan Magazine, Inc.*, 616 F. Supp. 370, 380 (S.D.N.Y. 1985) (taking judicial notice that many newsstands display magazines in a particular manner), *aff'd*, 788 F.2d 3 (2d Cir. 1986).

objections to *Moncrief*, *Higbee*, and *Prahl*. First, they protest that these decisions are not "binding" on the Second Circuit. Second, they urge that *Moncrief* and *Higbee* lack value because they are unpublished.

Both objections are misguided. Of course the Second Circuit was not bound by these cases. That is not the question. The question is whether the public policy interest in avoiding the unjust imposition of liability on government officials that lies behind this Court's qualified immunity jurisprudence permits a court to create a judicial fantasy wherein a law enforcement officer is charged with knowledge of a federal right that five judges trained in the law and engaged in a sincere effort to apply the Constitution to the situation at hand found to be nonexistent. With regard to Respondents' second objection -- that unpublished decisions lack intellectual merit -- it is sufficient to point out that this Court held in *Mitchell v. Forsyth*, 472 U.S. 511, 535 (1985), that a violated right was not clearly established because, *inter alia*, two district courts *outside the relevant jurisdiction* had upheld the challenged conduct in *unpublished* opinions. Surely a government official is not expected to devote more thought to these issues than a court of law, whether or not the court officially publishes its thought.

The "mountain of authorities" said to clearly establish respondents' right to be free from media attendance at the execution of a lawfully obtained search warrant was carefully considered in the petition. Pet. 10-11. None of the twelve cases relied on by the Second Circuit invalidated a search or seizure.[2/] Certainly none was sufficient to provide a

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[2/] *Michigan v. Summers*, 452 U.S. 692 (1981); *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 394 n.7 (1971); *United States v. Matias*,

(continued...)

reasonable law enforcement officer like Agent Mottola with a clear understanding that he was violating a constitutional right by permitting media representatives to witness the execution of a search warrant. Nor can decisions upholding certain uses of nongovernmental third parties to assist in the execution of a warrant be converted, as respondents contend, Br. Opp. 16, into a *clearly established* principle that the presence of nongovernmental third parties *not* assisting in the execution of a warrant violates the constitution. That proposition is a *non sequitur*.[3/]

[2/](...continued)
836 F.2d 744, 747 (2d Cir. 1988); *United States v. Crozier*, 777 F.2d 1376, 1381 (9th Cir. 1985); *United States v. Barlin*, 686 F.2d 81 (2d Cir. 1982); *United States v. Heldt*, 668 F.2d 1238, 1260 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 926 (1982); *United States v. Wright*, 667 F.2d 793, 797 (9th Cir. 1982); *United States v. Clouston*, 623 F.2d 485 (6th Cir. 1980); *United States v. Gervato*, 474 F.2d 40, 45 (3d Cir. 1973), *cert. denied*, 414 U.S. 864 (1973); *United States v. Gambino*, 734 F. Supp. 1084, 1091 (S.D.N.Y. 1990); *In re Southeastern Equip. Co. Search Warrant*, 746 F. Supp. 1563, 1577 (S.D. Ga. 1990); *United States v. Schwimmer*, 692 F. Supp. 119, 126-27 (E.D.N.Y. 1988). The last six of these cases interpret the federal warrant statute, 18 U.S.C. § 3105, not the Fourth Amendment. Their relevance to the inquiry whether a constitutional right has been *clearly established* remains unclear. The same holds true for Fed. R. Crim. P. 41, which regulates the issuance of search warrants, and cases interpreting it.

[3/]The other cases discussed in respondents' brief, *Anderson v. WROC-TV*, 441 N.Y.S.2d 220, 226 (Sup. Ct. Monroe Cty. 1981); *United States v. Sanchez*, 509 F.2d 886 (6th Cir. 1975); and *United States v. Warren*, 550 F.2d 219 (5th Cir. 1977), *cert. denied*, 434 U.S. 1016 (1978), *rev'd*, 578 F.2d 1058 (5th Cir. 1978) *(en banc), on reh'g*, 612 F.2d 887 (5th Cir. 1980) *(en banc), cert. denied*, 446 U.S. 956 (1980), *overruled in part by United States v. Bengivenga*, 845 F.2d 593 (5th Cir. Tex. 1988), *cert. denied*, 488 U.S. 924 (1988), do no more to clearly establish the right respondents claim. Respondents egregiously misinterpret the holding in *WROC;* the *WROC* court found that the news crew, not the Humane
(continued...)

What is left of respondents' "mountain" of authorities at the end of the day is a rather small "molehill" of constitutional generalities, not the clear warning of illegality to which law enforcement officers are entitled before liability is imposed upon them. And, in the context of qualified immunity jurisprudence, even these generalities are less than lucid or compelling. Abstract Fourth Amendment principles provide little guidance to law enforcement officers in the field. *See Anderson,* 483 U.S. at 644 ("We have frequently observed, and our many cases on the point amply demonstrate, the difficulty of determining whether particular searches or seizures comport with the Fourth Amendment."). Respondents have privacy interests like everyone else, but such interests can give way to society's interests when there is probable cause to suspect criminal activity, as was the case here. The Constitution's general privacy norms thus provide little useful guidance to an officer in the field making a decision about who may attend the execution of a search warrant.

Respondents argue that Agent Mottola's view "demeans the integrity of the law enforcement process by giving a 'green light' to plainly unconstitutional conduct which has not yet been brought to the attention of the courts," Br.

[3/](...continued)
Society agent they accompanied, committed a trespass. *See* 441 N.Y.S.2d at 222 (news crews' defenses at issue). The court found no violation of the Constitution whatsoever. *Sanchez* simply held that a search warrant authorizing a state officer to search for narcotics could not be used to validate a federal officer's search for explosives. 509 F.2d at 890. Similarly, *Warren* merely held that Drug Enforcement Agency agents could not search for narcotics on the general authority of the Coast Guard to board oceangoing vessels for safety inspections. 550 F.2d at 225. Neither *WROC, Sanchez,* nor *Warren* suggested that the parties with valid warrants committed a constitutional violation simply by permitting the parties lacking such warrants to accompany them.

Opp. 23, but Agent Mottola believes his position protects the integrity and efficacy of the law enforcement process by preventing unwarranted imposition of liability on law enforcement officials for conduct which is arguably unconstitutional when that conduct has been brought to the attention of several courts and those courts have not found it problematic. This Court has previously recognized that "officials who act in ways they reasonably believe to be lawful . . . should not be held personally liable" for unlawful conduct. *Anderson*, 483 U.S. at 641. This Court should grant review to prevent erosion of that protective principle.

2. Prominent authorities have noted the divisions among the circuits identified by petitioner regarding both the sources of authority to be used to determine whether a particular right is clearly established and their required level of specificity. *See, e.g.*, ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 8.6 (2d ed. 1994); SHELDON H. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983 § 8.07 (3d ed. 1994). Contrary to respondents' contentions, the Second, Sixth, Tenth, and Eleventh Circuits rely on a narrower evaluation of existing cases than that employed by other circuits to ascertain whether a particular right is "clearly established" for purposes of eliminating a state actor's qualified immunity. While the Second Circuit here did in fact consider general constitutional cases from other jurisdictions *supporting* its view that the right claimed by respondents was clearly established in the Second Circuit, it *completely ignored* cases from other jurisdictions -- the only cases directly on point -- which found that the right claimed by respondents does not exist. The overarching justification for this selectivity, if there is one, may be found in the Second Circuit's view that clear establishment is essentially a "local" exercise. *See, e.g., Richardson v. Selsky*, 5 F.3d 616 (2d Cir. 1993) ("To be sure, by 1985, other circuits had begun to adopt various approaches . . . However,

as of March 1985, when [plaintiff's] disciplinary hearing was held, in this Circuit the contours of his claimed federal rights . . . were not clearly delineated."); *Russell v. Scully,* 15 F.3d 219 (2d Cir. 1993), *on petition for rehearing,* 15 F.3d 222, 223-24 (1994); *Soares v. State of Connecticut,* 8 F.3d 917, 922 (2d Cir. 1993).

Respondents unsuccessfully try to conflate the methodology used in the Second, Sixth, Tenth, and Eleventh Circuits with that employed by the other circuits by showing that the former too permit reference to the laws of other jurisdictions. This is true, but only in restricted circumstances. As noted in the petition, the Sixth Circuit permits establishment by other courts "[i]n an extraordinary case." *Ohio Civil Serv. Employees Ass'n v. Seiter,* 858 F.2d 1171, 1177-78 (1988). The Tenth Circuit considers the law in other circuits, but such cases generally lack effect unless they represent the "clearly established weight of authority from other courts." *Woodward v. City of Worland,* 977 F.2d 1392, 1397 (10th Cir. 1992) (rejecting claim that right was clearly established in 1987 despite cases in the Third and Seventh Circuits and several district courts holding to the contrary), *cert. denied,* 113 S. Ct. 3038 (1993). And as respondents concede, Br. Opp. 28-29, the Eleventh Circuit accords little weight to foreign precedent for purposes of determining whether a particular right is clearly established. *Belcher v. City of Foley,* 30 F.3d 1390, 1400 (11th Cir. 1994) (rejecting clear establishment despite Fifth and Ninth Circuit cases to the contrary).

This Court recently decided that lower courts should rely on "full knowledge of [their] own [and other relevant] precedents," rather than just the precedents presented by the parties, to determine whether a particular right was clearly established. *Elder v. Holloway,* 114 S. Ct. 1019, 1023 (1994). Respondents argue that this resolves any disagreement

among the circuits regarding petitioner's claims. In petitioner's view, *Elder v. Holloway* begs rather than resolves the two circuit-dividing questions behind Agent Mottola's petition: What are the "other relevant precedents" upon which a court may (or must) rely, and may a court ignore case law from other jurisdictions which is directly on point in favor of more general case law in its own jurisdiction which suggests a contrary result? This court should grant review to consider these important questions on which the courts are divided.

CONCLUSION

Therefore, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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